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CRIMINAL APPEAL REPORTS
1958

EDITED BY

T. R. FITZWALTER BUTLER

of the Inner Temple and Midland Circuit, Barrister-at-Law,
Recorder of Newark

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APPELLANTS AND APPLICANTS

Adair, G. J. ... 227
Anderson, R. ... 91

Bellson, S. ... 207

Chapman, F. ... 257

Edgar, C. ... 192

Field, M. F. ... 221
Fitzpatrick, G. P. ... 221
Flynn, D. ... 15

Garlick, F. W. ... 141
Gordon, A. V. ... 177
Green, N. ... 77

Hammersley, J. R. ... 207
Hart, R. C. ... 47
Heath, T. E. ... 207
Hone, S. J. ... 183
Howard, D. ... 23

Ibrahim, H. ... 38

Knight, J. ... 221

McCartan, S. ... 263
Marley, E. G. ... 218
Matheson, A. E. ... 145
Maytum-White, L. P. ... 165

Noseda, G. E. ... 221

Oliver, R. ... 27
Oliver Autos, Ltd. ... 183

Parr, G. H. ... 192
Pilkington, L. ... 233
Pontika, P. ... 192

Renze, A. ... 38
Richard, V. ... 183
Rooney, T. A. ... 192

St. Margaret's Trust, Ltd. ... 183
Solomon, D. J. ... 9
Spencer, T. ... 177
Spriggs, J. F. ... 69
Suleyman, A. ... 38
Suleyman, O. ... 38
Sweetland, F. R. ... 62
Sweetland, W. E. M. ... 62

Vaccari, A. ... 85

Wallwork, W. E. ... 153
Wickins, T. G. ... 236

DIVISIONAL COURT CASES

Beer *v.* Davies ... 198
Hastings, *Re* ... 132
Hill *v.* Baxter ... 51
National Coal Board *v.* Gamble ... 240
R. *v.* Oliver ... 27

CIRCUIT AND CENTRAL CRIMINAL COURT CASES

R. *v.* Bastian ... 75
R. *v.* Joyce ... 19
R. *v.* Potter ... 168
R. *v.* Singh ... 35
R. *v.* Smith and Others ... 35

COURTS-MARTIAL APPEAL COURT CASE

Matthews, A. E. 93

PRIVY COUNCIL CASES

Bullard *v.* The Queen 1
Surujpaul *v.* Reginam 266

HOUSE OF LORDS CASE

D. P. P. *v.* Head 98

TABLE OF CASES CITED

Ackroyds Air Travel *v.* D. P. P. (1950) 244, 251
Alanie 166
Algar (1954) 130
Allen *v.* Farquharson Bros. (1932) 87
Aves (1950) 58

Bailey's Case (1854) 122
Bassey (1931) 169, 173
Bishop (1880) 189
Bourdon, *Re* (1847) 121
Brend *v.* Wood (1946) 190
Brooks *v.* Mason (1902) 190
Bullock (1954) 241, 246, 247, 251

Cafferata *v.* Wilson (1936) ... 251
Callaghan (1913) 78, 82
Chapman (1910) 172
Chapman *v.* O'Hagan (1949) 237–240
Clement (1821) 34
Coney (1882) 251, 255
Cook *v.* Stockwell (1915) 251
Cooper and Compton (1947) 64, 210
Craske (1957) 38–44
Cundy *v.* Le Cocq (1884) 189

De Reneville *v.* De Reneville (1948) 130
Dimes *v.* Grand Junction Canal (1852) 129
Downes, *ex p.* (1954) 195

Ettridge (1909) 80
Everett *v.* Griffiths (1921) 129

Faulder v. Silk (1811) 122
Ferguson *v.* Weaving (1951) ... 253
France (1839) 195

Gilmore, *Ex p.* (1957) 126, 130
Greene *v.* Home Secretary (1942) 122, 123
Grubb (1945) 138

Haddy (1944) 163
Harding *v.* Price (1948) 190
Harnett *v.* Bond (1924) 128
Harvey *v.* R. (1901) 124
H.M. Advocate *v.* Braithwaite (1945) 72
H.M. Advocate *v.* Savage (1923) 72
Hill *v.* Clifford (1907) 123, 124
Hobbs *v.* Winchester Corporation (1910) 189
Holmes *v.* D. P. P. (1946) 58
Hopper (1915) 5
Hughes (1860) 266, 270, 272

Johnson *v.* Youden (1950) 253

Kay *v.* Butterworth (1945) 56
Kilham (1870) 172
Kwaku Mensah *v.* The King (1946) 5

Leighton *v.* Leighton (1720) 129
Leon (1945) 141, 144
Leonard Watson's Case (1839) 122
Lobell (1957) 1, 8, 58
Lomas (1913) 246, 247
London and Globe Finance Corporation, *Re* (1903) 173
Luberg (1926) 210

McPherson *v.* McPherson (1936) 129
Mancini *v.* D. P. P. (1942) ... 1, 6
Marshalsea, The Case of The (1612) 129
Melvin & Eden (1953) 232
Meyrick *v.* Ribuffi (1929) 217
Mousell Bros. *v.* London & North Western Ry. (1917) 190
Muir *v.* H.M. Advocate (1933) 72
Mulcahy (1868) 210, 217
Murray *v.* Murray (1941) 130

Nat Bell Liquors (1922) 129
Newman (1882) 233, 235
Nicholas *v.* Hall (1873) 190

O'Connell *v.* R. (1844) 133, 136, 139
Owen (1952) 15, 16, 18

Parker (1837) 166
Parker (1870) 194
Parnell (1881) 217
Pearce *v.* Brooks (1866) 251
Phillips *v.* Quayle (1938) 194
Prince (1875) 189

Quality Dairies (York) *v.* Pedley (1952) 190
Queen's Case (1820) 121

Reynolds v. G. H. Austin & Sons (1951) 190
Richardson *v.* L. C. C. (1957) 105
Roberts (1942) 7
Rossi, *ex p.* (1956) 198, 201, 205
Rowley (1948) 266, 271
Rutty, *Ex p.* (1956) 122

Salte *v.* Thomas (1802) 121
Sergeson *v.* Sealey (1742) 122
Sherras *v.* De Rutzen (1895) 189
Simmons *v.* Swift (1826) 249
Smith (1923) 232
Smith (1925) 78, 82
Smith *v.* East Elloe R. D. C. (1956) 125
Smith's Potato Estates *v.* Bolland (1948) 87
Steane (1947) 250
Stirland *v.* D. P. P. (1944) 163
Strong & Co. *v.* Woodifield (1906) 87
Strother *v.* Barr (1825) 121

Tolson (1889) 190

Van Grutten *v.* Foxwell (1897) 123

Walne (1870) 166
Whittall *v.* Kirby (1947) 237–240
Wilcox *v.* Jeffery (1951) 255
Wilson (1957) 16, 18
Wilson *v.* Inyang (1951) 252
Woolmington *v.* D. P. P. (1935) 58

TABLE OF STATUTES

1825 6 Geo. 4, c. 50 (Juries Act), s. 37 .... 10, 12

1848 11 & 12 Vict. c. 42 (Indictable Offences Act), s. 17 195

11 & 12 Vict. c. 78 (Crown Cases Act), s. 5 139

1861 24 & 25 Vict. c. 94 (Accessories and Abettors Act), ss. 1, 2 269

1869 32 & 33 Vict. c. 62 (Debtors Act), s. 13 (1) 141, 144

1881 44 & 45 Vict. c. 58 (Army Act),
- s. 17 94
- s. 25 (1) (*a*) 93, 94, 95

1885 48 & 49 Vict. c. 69 (Criminal Law Amendment Act), s. 7 258

1888 51 & 52 Vict. c. 46 (Oaths Act), s. 1 44–46

1889 52 & 53 Vict. c. 21 (Weights and Measures Act), s. 21 ... 241, 244, 248, 255

52 & 53 Vict. c. 63 (Interpretation Act), s. 26 .... 201, 205

1893 56 & 57 Vict. c. 71 (Sale of Goods Act), ss. 17, 18 .... 241, 254

1907 7 Edw. 7, c. 23 (Criminal Appeal Act),
- s. 4 140
  - (1) 108, 152, 162, 221
  - (3) 77–85
- s. 5 140
  - (2) 227, 231, 232
- s. 18 (*b*) 262, 263

1908 8 Edw. 7, c. 48 (Post Office Act), ss. 50–56 220

1911 1 & 2 Geo. 5, c. 6 (Perjury Act), ss. 1 (1), 15 (2) 44, 46

1913 3 & 4 Geo. 5, c. 27 (Forgery Act), s. 1 .... 169, 175

3 & 4 Geo. 5, c. 28 (Mental Deficiency Act),
- s. 1 .... 98, 107, 115, 117
- ss. 3, 4 103
- s. 6 123
- s. 9 .... 98, 99, 101, 106, 112, 118, 123, 126
- s. 10 107
- s. 11 (5) 102, 107, 123, 124
- s. 12 (2) 115
- s. 42 120

1913 3 & 4 Geo. 5, c. 28 (Mental Deficiency Act)—*cont.*
- ss. 49, 50 106
- s. 56 (1) (*a*) 98–131
- s. 64 128

1914 4 & 5 Geo. 5, c. 59 (Bankruptcy Act), s. 157 (1) 85–91

1915 5 & 6 Geo. 5, c. 90 (Indictments Act), s. 3 .... 154, 207, 212

1916 6 & 7 Geo. 5, c. 50 (Larceny Act),
- s. 1 (1) 140
- ss. 12, 18 220
- s. 32 (1) 165, 168, 177
- s. 33 220

1924 14 & 15 Geo. 5, c. 22 (Carriage of Goods by Sea), Sched., Art. III (4) 179

1925 14 & 15 Geo. 5, c. 86 (Criminal Justice Act),
- s. 13 (3) 37
- s. 14 (2) 27–34
- s. 35 (1) 169, 175

1930 20 & 21 Geo. 5, c. 43 (Road Traffic Act),
- s. 11 51–62
- s. 15 (2) 236, 238, 239
- s. 21 198–207
- s. 49 (*b*) 52, 54

1933 23 & 24 Geo. 5, c. 36 (Administration of Justice (Miscellaneous Provisions) Act), s. 2 (2) (*b*) ... 35, 36, 207, 212

23 & 24 Geo. 5, c. 38 (Summary Jurisdiction (Appeals) Act),
- s. 3 .... 201, 206

1938 1 & 2 Geo. 6, c. 63 (Administration of Justice (Miscellaneous Provisions) Act), s. 11 (3) 27–34

1948 11 & 12 Geo. 6, c. 58 (Criminal Justice Act),
- s. 3 .... 262, 264
- ss. 6, 8 .... 77, 85
- s. 41 .... 55, 218, 219, 220

1952 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55 (Magistrates' Courts Act),
- s. 7 (1) 193, 195
- s. 10 (2) 27–34
- ss. 19 (5), 24 38–44

1953 1 & 2 Eliz. 2, c. 36 (Post Office Act), ss. 52–58 220

1955 3 & 4 Eliz. 2, c. 18 (Army Act), s. 62 95

1956 4 & 5 Eliz. 2, c. 69 (Sexual Offences Act),
s. 8 .... 98, 109, 113
s. 10 (1) 154
ss. 17, 18 261
s. 19 257–262
s. 22 261

1957 5 & 6 Eliz. 2, c. 11 (Homicide Act),
s. 2 .... 75, 145, 153
s. 2 (1) 69–74

[JUDICIAL COMMITTEE OF THE PRIVY COUNCIL]

BEFORE

EARL JOWITT, LORD TUCKER AND THE
RT. HON. L. M. D. DE SILVA

BULLARD *v.* THE QUEEN

1957
July 15, 16;
Oct. 2

Summing-up — Murder — Manslaughter — Defence of Self-Defence Rejected by Jury—Issue of Provocation still Open on Same Evidence.

In MANCINI *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 28 Cr. App.R. 65 at p. 74; [1942] A.C. 1 at p. 9 Viscount Simon L.C. did not intend to lay down as a proposition of universal application that the same evidence which has been adduced in support of an unsuccessful defence of self-defence can never be relied on, in whole or in part, as affording provocation sufficient to reduce the crime from murder to manslaughter. Conduct which cannot justify may well excuse. Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence on which such a verdict can be given. To deprive him of that right must of necessity constitute a grave miscarriage of justice.

Observations on direction on onus of proof on the issue of self-defence.

Direction suggested in LOBELL, 41 Cr.App.R. 100 at p. 104; [1957] 1 Q.B. 547 at p. 551 approved.

Appeal against conviction.

On November 19, 1956, the appellant, Joseph Bullard, was convicted in the Supreme Court of Trinidad and Tobago of the murder of one Eugene Layne. On January 4, 1957, the Court of Criminal Appeal of Trinidad and Tobago dismissed an appeal against conviction.

The following statement of facts is taken from the judgment of the Judicial Committee. The evidence for the prosecution was to the effect that the appellant was employed by Layne in the construction of a house at Corinth and at about 7 a.m. on July 23, 1956, he was following Layne about and complaining he had not been paid what was due to him. Layne said he had not the money and that the appellant would have to wait until he, Layne, returned from the Usine in the afternoon. The appellant was carrying a hatchet. Layne and the appellant were walking together and when they reached the main Naparima–Mayaro road they were picked up by a car driven by a witness named Chapman, who knew Layne well and had stopped his car on seeing him standing at the roadside. The appellant got into the back seat and Layne into the front seat beside the driver Chapman. Before getting in the appellant said: " This man owes me $60.00 and will not pay me my money." Layne replied: " Do not worry with that man; he is a madman. I do not owe him any $60.00." The appellant on taking his seat placed the hatchet he was carrying on his lap.

After the car had started Layne said: " I am going to the Usine and even if I owe you money now, you are going to the Usine for it." The appellant said: " He does not want to pay me my money." After travelling about 100 yards farther the appellant called out: " Oh, God, I want my money. I want my money." At the same time he struck Layne at the back of his head with the hatchet. Chapman pulled up the car, the appellant got out and Chapman drove straight to the police station and then took Layne to hospital. He was admitted at about 8 a.m. and died at 3.25 p.m. the same day. The post-mortem examination some eighteen hours later disclosed a stitched wound over the right temporal bone and a stitched semi-circular wound at the top of the head, nearer back than front, right across the top of the head. Internally there was a depressed fracture involving the right temporal, the parietal and left temporal bone of the skull. The fracture was immediately below the wound at the top of the head. Death was due to shock and haemorrhage from the fracture of the skull. In the opinion of the medical witness the first wound was caused by the back of the hatchet. As regards the second wound, he said: " I would think the cutting part of the hatchet would be used." In his opinion the blows were struck from behind. If the men were facing each other, the first wound might have been caused by a back-handed blow. He did not think the injury at the top of the head could have been caused by a back-handed blow. He would not say it was utterly impossible, but highly unlikely. Both wounds were lacerated wounds and were caused by distinct blows. A second medical witness said that the wounds in the right temporal region as well as in the parietal region could probably be caused by the head of the hatchet.

The evidence of the appellant was as follows. On July 23, Layne owed him $160.00, and said he would give him $60.00 later. The appellant asked for $8.00 to fix his business at home. Layne said he would take him to the Usine for the $8.00. They walked peacefully to the main road, the appellant carrying his hatchet and a paper bag. Chapman's car stopped and they got in. On the way the appellant asked if Layne would give him the money he was wanting. Layne said: " If not, what will you do? " He replied: " I will report you at the Usine." Layne said: " You are going to make me lose my work " and grabbed him by his neck and started to choke him with his left hand and cuffed him with his right. The appellant picked up the hatchet and gave him two blows. He said: " I suppose it must be the back of the hatchet that struck him. I made the blows because he was strangling me. If Layne had not held my throat, I would not have hit him with the hatchet." In cross-examination he said: " Layne was choking me in the car, my head was going backwards all the time as I demonstrated. My head reached the back of the seat and could not go any farther. One of Layne's feet was over the back of the front seat and the other was resting on the front seat. Layne gave me twelve or fourteen cuffs on my ribs and face. One cuff caught me on my jaw. It was while he was cuffing me that I swung the two blows with the hatchet." On that evidence counsel for the appellant relied on the defences of self-defence and provocation.

Dealing with the defence of provocation in his summing-up, the trial judge, after having told the jury: " You must be satisfied that the deceased died as a result of a deliberate, cruel and brutal act committed by the accused, voluntarily, which was unintentional and unprovoked," proceeded as follows: " In some indictments it is open to the jury to return a verdict of Not Guilty of murder, but Guilty of manslaughter on the ground of provocation. As a matter of law it is my duty to direct you that in the circumstances of this particular case the verdict is not open to you for reasons which I shall show you later. And since no defence of insanity has been put up, and therefore you cannot return a verdict of Guilty but Insane, the only two verdicts which will be open to you are either ' Guilty of murder ' or ' Not Guilty at all ' on the ground of self-defence." After outlining the evidence given by the appellant, he said: " Well, that is the evidence given in chief by the accused Bullard. In that will lie his defence. You must give due consideration to his defence and you must give to it the weight and the attention which you think it deserves. But I have directed you that it will not be open to you to return a verdict of manslaughter on the ground of provocation, because it is from the evidence that you must get the provocation, if there is any. And, putting the most favourable construction on this evidence given here on oath by the accused, he has not himself told you that what he did was a result of any provocation given him by Layne." A few lines later he said: " I am directing you that nowhere in his statement, his evidence given on oath, will you find that he committed this act because he was provoked by Layne's refusal or failure to pay him the money. His evidence here is that, if Layne had not held my throat, I would not have hit him with the hatchet."

The hearing took place on July 15 and 16, 1957.

Ralph Millner and *Jenny Bisschop*, for the appellant.
J. G. Le Quesne, for the Crown.

At the conclusion of the arguments, EARL JOWITT said: " For reasons which will be stated hereafter, their Lordships will humbly advise Her Majesty that this appeal should be allowed; that the verdict of Guilty of murder should be set aside; that the case should be remitted to the Court of Criminal Appeal below with a direction to record a verdict of manslaughter and to pass a sentence which seems to them appropriate for this very grave crime.

October 2. The reasons for allowing the appeal were delivered by

LORD TUCKER [after stating the facts as set out above:] It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and, whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked. See such cases as HOPPER, 11 Cr.App.R. 136; [1915] 2 K.B. 431, at p. 435, and KWAKU MENSAH *v.* THE KING [1946] A.C. 83, at p. 93.

In the present case it is not the non-payment of money by Layne that is relied on as affording provocation, but the assault, as described in the appellant's evidence, upon a man who, on the prosecution evidence, was already incensed by the non-payment and whose claim had been brushed aside by Layne with the statement that he was a madman. The non-payment alone could not, of course, have afforded any sufficient provocation. Their Lordships do not know exactly upon what counsel for the defence at the trial based his case of provocation. If it was based solely on the non-payment, this may account for the language used by the judge. However this may be, the real ground as disclosed by the evidence is as indicated above, and it should have been left to the jury, whose duty it would have been to determine with what part of the hatchet the blow or blows were struck and whether the weapon used was or was not wholly disproportionate to the provocation received, and whether the story of the appellant, even if unacceptable in its entirety or somewhat exaggerated, might not have afforded sufficient provocation to excuse—though not to justify—the blows struck by the appellant. The jury might, for instance, have rejected the view that the appellant's life was ever in real peril from strangulation, yet accepted the story that he had been seized by the throat and received numerous violent blows. All these matters were for the jury, and it is not, in their Lordships' opinion, possible, taking the view of the evidence most favourable to the appellant, to say that the issue of manslaughter could properly be withdrawn from the jury.

The Court of Criminal Appeal took the view that, as the appellant's story had been rejected by the jury on the issue of self-defence, there was no evidence on which the issue of provocation could be based, and in so deciding relied on the language used by Viscount Simon L.C. in his speech in MANCINI *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 28 Cr.App.R. 65, at p. 74; [1942] A.C. 1, at p. 9, as follows: " Before, therefore, Macnaghten J.'s summing-up can be criticised on the ground that it did not deal adequately with the topic of provocation, we have to see what was the extent of the provocation as disclosed by the evidence which the jury had to consider, and for this purpose we have to exclude altogether the allegation made by the appellant that he heard the voice of Fletcher threatening him with ' knifing,' and that Distleman came at him with an open penknife in his hand. The judge had already instructed the jury fully on these matters and had directed the jury to acquit the appellant altogether if they felt they could accept the appellant's story. The alternative case, therefore, as to which it is suggested that a defence of provocation was open, must be regarded on the basis that the appellant's story was rejected." This language must be considered in the context of the facts of that particular case, when it would seem true to say that, once the story of the presence of a knife in Distleman's hands was rejected, there was nothing left upon which to base the defence of provocation, but their Lordships have no doubt that Viscount Simon L.C. was not intending to lay down as a proposition of universal application that the same evidence which has been adduced in support of an unsuccessful defence of self-defence can never be relied upon in whole or in part as affording provocation sufficient to reduce the crime from murder to manslaughter. Conduct which cannot justify may well excuse.

In the present case the fact that the jury rejected the defence of self-defence does not necessarily mean that the evidence for the defence was not of such kind that, even if not accepted in its entirety, it might not have left them in reasonable doubt whether the prosecution had discharged the onus which lay on them of proving that the killing was unprovoked. Their Lordships do not shrink from saying that such a result would have been improbable, but they cannot say it would have been impossible. As was said by Humphreys J. in ROBERTS (1942) 28 Cr.App.R. 102, at p. 110: " As for the question whether it was open to them on the facts, counsel for the prosecution has argued with good reason that no reasonable jury could come to such a conclusion. The court may be disposed to take much the same view, but it cannot delve into the minds of the jury and say what they would have done if the issue had been left open to them." Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached. Their Lordships are accordingly of opinion that the verdict of Guilty of murder cannot stand in this case.

A further objection was taken by counsel for the appellant, which was not raised in the Court of Criminal Appeal. It was said that the trial judge had misdirected the jury with regard to the onus of proof in connection with the defence of self-defence. Early in his summing-up the judge said: " The most important direction in law which I have to give you is that the onus of proof is always on the prosecution. It is for the Crown to establish the guilt of the accused and never for an accused person to establish his own innocence. You must be satisfied by the evidence led by the prosecution that you can feel certain of the guilt of the accused. And if you do not feel that certainty on the evidence led by the prosecution, then it is your duty to acquit the accused." A little later he used the words already quoted: " You must be satisfied that the deceased died as a result of a deliberate, cruel and brutal act committed by the accused voluntarily, which was intentional and unprovoked."

It is said that the effect of this general direction was vitiated by the fact that later in his summing-up the judge, in dealing with the respective versions of the incident in the car used the words: " so that you now have to decide whether you believe Chapman that Layne was sitting quietly in front of the car looking ahead of him when the accused dealt him those two severe blows, or whether you believe Bullard that Layne had leaned over and was strangling him in such a manner that it was necessary for him to use extreme methods to defend himself." It is important to observe that in the very next sentence the judge said: " Bear in mind the general directions in law which I have given you." Later on he again used a similar expression: " If you believe the evidence given by the witnesses for the prosecution and you do not believe that evidence given by Joseph Bullard. . . ."

Having regard to the fact that there was no dispute that the blows were struck by Bullard and that the only issue left to the jury was self-defence, their Lordships do not consider that the jury can have been left in any doubt as to the onus being throughout upon the prosecution. It would, no doubt, have been better if the judge had used language similar to that suggested by Lord Goddard C.J. in the recent case of LOBELL (41 Cr.App.R. 100, at p. 104; [1957] 1 Q.B. 547, at p. 551): " A convenient way of directing the jury is to tell them that the burden of establishing guilt is on the prosecution, but that they must also consider the evidence for the defence which may have one of three results: it may convince them of the

1957
July 15, 16;
Oct. 2

BULLARD *v.*
THE QUEEN

Lord Tucker

innocence of the accused, or it may cause them to doubt, in which case the defendant is entitled to an acquittal, or it may and sometimes does strengthen the case for the prosecution." But there is no magic formula, and provided that on a reading of the summing-up as a whole the jury are left in no doubt where the onus lies, no complaint can properly be made.

In the result their Lordships have humbly advised Her Majesty that the appeal be allowed and the verdict of Guilty of murder set aside and the case remitted to the Court of Criminal Appeal of Trinidad and Tobago with a direction to record a verdict of Guilty of manslaughter and to pass sentence accordingly.

Appeal allowed.

Solicitors: T. L. Wilson & Co., for the appellant; Charles Russell & Co., for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE GORMAN
AND MR. JUSTICE PEARSON

DONALD JAMES SOLOMON

1957
Nov. 11

Jury—No Jurors Present at Quarter Sessions—Praying of Tales by Clerk of the Peace—No Proper Jury if Composed Entirely of Talesmen—Proper Procedure where Complete Defect or Shortage of Jurors.

There cannot be a jury composed entirely of talesmen prayed because of a complete absence of the jurors who have been summoned. If there is a complete absence of jurors named in the panel, and it is desired to proceed with the trial on the same day, the proper course is to require the sheriff to return a further panel *instanter*.

Where, therefore, on the appearance of a defendant to take his trial at a borough quarter sessions, all the jurors who had

1957
Nov. 11

DONALD
JAMES
SOLOMON

Goddard
L.C.J.,
Gorman J.,
Pearson J.

been properly summoned and who had attended on the previous day had, owing to a misunderstanding, been dismissed, and the clerk of the peace sent out to a neighbouring building and found twelve persons and formed them into a jury.

Held, that the position being governed by common law, as the Juries Act, 1825, did not apply to quarter sessions, although no objection had been taken by defending counsel to the procedure at the time, there had been a mistrial and a *venire de novo* must be ordered directing the appellant to be re-arrested and tried at the next quarter sessions for the borough.

Appeal against conviction.

The appellant was convicted at Brighton Quarter Sessions on June 21, 1957, of larceny, and was sentenced by the Recorder (C. J. A. Doughty Esq., Q.C.) to a fine of £50 and ordered to pay £25 costs.

When the appellant surrendered to take his trial, all the jurors, who had been properly summoned and who had attended on the previous day, had, owing to a misunderstanding, been discharged. The clerk of the peace then sent out and found in a neighbouring building twelve persons who lived within the County Borough of Brighton or the County of Sussex. He assembled them in the box as a jury and told the Recorder and counsel what he had done, and no objection was taken to the procedure at the time either by the Recorder or by counsel.

Edward Clarke (*Colin Wilson* with him), for the appellant. The procedure adopted by the clerk of the peace was wholly irregular. Section 37 of the Juries Act, 1825, which deals with praying *tales de circumstantibus*, does not apply to quarter sessions, and where a tales is prayed at quarter sessions, the practice is, therefore, governed by common law. No tales can be prayed when no jurors from the original panel are present. There cannot be tales without quales, and the principle of praying a tales is applicable only when some, but not the full number, of the original panel are present. Further, no tales can be prayed unless asked for by the prosecution or the defence, and where a tales is properly prayed, the jurors summoned must be themselves "able men of the county" and duly qualified as jurors. Also a *tales de circumstantibus* must be collected from persons within the precincts of the court; persons in a separate building are ineligible. No regard was had to any of the aforementioned principles in the present case; the procedure adopted was one wholly unknown to the law, and the conviction of the appellant was thereby invalidated.

C. J. T. Pensotti, for the Crown. The common law principles applying to the praying of a tales at quarter sessions are obscure and uncertain. In the present case, however, the appellant's counsel at the trial was aware of what was being done by the clerk of the peace and raised no objection and any irregularity there may have been should, therefore, be regarded as having been waived.

THE LORD CHIEF JUSTICE: The appellant in this case was indicted before the learned Recorder of Brighton for larceny. He is a doctor who was charged with stealing money out of the pockets of patients or persons at the hospital where he was employed. When the case came on to be tried, through some mistake all the jurors who had been summoned to the Brighton Quarter Sessions and who had been in attendance the previous day had been dismissed. How the very unfortunate mistake arose we need not inquire. The clerk of the peace, finding himself without any jurors, proceeded himself to pray a tales, in the sense that he sent out and collected twelve people, and I have no doubt they were equally as efficient jurors as the persons who had been discharged the day before. We need not in this case go into the question whether or not they had qualifications by living in the borough. Suffice it to say that they were all people who lived either in the County Borough of Brighton or in the County of Sussex. He got these twelve people into the box. He told the Recorder and the parties what had happened, and the prisoner, who was represented by Mr. Harold Brown, Q.C., was asked if he had any objection, and the learned counsel said that he had no objection to the jury as a whole.

1957
Nov. 11

DONALD JAMES SOLOMON

Goddard L.C.J., Gorman J., Pearson J.

Having been convicted and given an extraordinary lenient sentence, the appellant has now taken the point that the jury by which he was convicted was an improper jury, and that therefore the trial was a nullity. This raises the question of how a tales can be properly prayed and what are the necessities before talesmen can be empanelled as jurors. A good many questions have been raised in this case, and one may say that the law with regard to talesmen is very obscure, and particularly obscure with regard to proceedings at quarter sessions because section 37 of the Juries Act of 1825, which deals with *tales de circumstantibus*, does not apply in terms to quarter sessions. It applies to Courts of Assize, any of the superior civil courts of the three Counties Palatine, that is Durham, Lancaster and Chester, " or before any court of great sessions." That means the Court of Great Sessions of Wales, which had existed since the reign of Henry VIII, but they were not quarter sessions of the peace, which is an entirely English court, and not a court of great sessions. Therefore, if tales are prayed at any rate at borough quarter sessions and, I think, county quarter sessions, the common law must prevail and the common law seems to be somewhat obscure on the subject.

We have been referred to passages in Hale, Vol. II, p. 265, Blackstone (16th ed., 4 Com. 354) and Hawkins' *Pleas of the Crown* (Vol. II, 565, 566, ss. 17, 19). One thing, at any rate, does emerge as certain, and it is on this that we propose to base our judgment, and that is that there cannot be a complete jury of talesmen. The procedure is this: For quarter sessions, two justices of the peace at least send their precept to the sheriff to summon jurors, just as judges who are going on assize send their precept to the sheriff, and the sheriff, acting in accordance with the precept, must prepare panels. He summons jurors, and he returns the panel to the judge or the clerk of the peace of quarter sessions. It will be known by members of the Bar that at the Assizes the crier addresses the sheriff and calls on him " to return the several writs and precepts that my Lords the Queen's Justices may proceed thereon," and what the sheriff then hands to the judge is the jury panel. Those are the jurors he has summoned. In our opinion, if there is a defect in the jury, that is to say, if a full jury cannot be empanelled from the names on the panel, a tales can be prayed. Whether the talesmen must be actually present in the precincts of the court or can be brought in from the street, we need not inquire, because we do not want to give a decision on any point that is immaterial. But it seems to the court that there cannot be a jury composed entirely of talesmen because the very fact that it is a tales implies that there must be a quales. Since writs of error were done away with, records are not now drawn up, but, if the record had been drawn up, the jury panel would have had to be set out in the record and also the names of the jurors who actually were empanelled to try the issue. If there were no jurors who were in the original panel, it would have been plain on the record that twelve people tried the prisoner who had not been summoned, and if a tales is to be summoned there must be, as it seems to the court, a jury composed partly of those who have been summoned, the quales, and added to them, if the record had been drawn up, such persons standing by as would make up the full jury. In this case all the persons who tried the case had never been summoned. If there is a complete defect or shortage of jurors, as happened in this case, the court desires to say that in their opinion the proper course is to require the sheriff to return a further panel *instanter.* It may be that at borough quarter sessions that would be impracticable. We have considered that, as the clerk of the peace summons the jurors. At any rate, if this happens again and the trial is to proceed on the same day, it seems to us that the right course instead of praying tales is to require a fresh panel to be empanelled *instanter.*

We feel bound to say that the jurors who tried this case were unqualified. There was no qualified person among them. It is not a matter of saying that, as no objection was taken and the appellant and his counsel had knowledge of what had taken place, this court cannot give effect to the objection or ought not to give effect to the objection on the ground of waiver or

1957
Nov. 11

DONALD
JAMES
SOLOMON

Goddard
L.C.J.,
Gorman J.,
Pearson J.

on any other ground, because it seems to this court that there was no jury at all. As there were no quales, it follows that there were not tales because there cannot be a tales without a quales. Therefore, it is as if the trial had taken place before no jury at all. We feel bound, therefore, with great reluctance, to set aside the verdict and judgment that were given in this case. We shall certainly order a *venire de novo* to issue, that is to say, we shall order a warrant to be issued for the arrest of the appellant, who can therefore be taken before justices and bailed to appear again at the next sessions. The court will therefore give directions to the Master of the Crown Office that a warrant must be issued for his arrest and the justices can proceed to bail him, and he will be tried at the next quarter sessions.

Appeal dismissed.

In answer to an application on behalf of the appellant that the court should make an order directing the appeal to be tried at the next East Sussex Quarter Sessions, and not at the next Brighton Quarter Sessions, the LORD CHIEF JUSTICE said: "We shall not make any order. The case must go back to the same court. *Venire de novo* is, strictly speaking, addressed to the sheriff. It will go back to the same court, but that does not prevent you, if you wish, from making an application to the Queen's Bench Division for the case to be tried elsewhere."

As a result of an application made on behalf of the appellant, the Queen's Bench Division ordered the re-trial to take place at the next East Sussex Quarter Sessions. On January 13, 1958, the appellant was there tried and acquitted.

Solicitors: Hempsons, for the appellant; The Town Clerk, Brighton, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE GORMAN
AND MR. JUSTICE PEARSON

DAVID FLYNN

1957
Nov. 11

Witness—Evidence Called in Rebuttal—Defence of Alibi not Disclosed till Trial—Evidence and Speeches Concluded—Discretion of Judge.

Subject to the rule that no further evidence must be introduced after the conclusion of the summing-up, the question whether the prosecution shall be allowed to call rebutting evidence or not is one for the discretion of the presiding judge. Where an alibi has not been disclosed before the trial, and evidence tending to rebut the alibi comes into the possession of the prosecution at a late stage, such evidence ought, as a general rule, to be admitted and may be admitted even after the close of the evidence and the conclusion of speeches of counsel.

OWEN, 36 Cr.App.R. 16; [1952] 2 Q.B. 362 approved and followed.

Application for leave to appeal against conviction.

The applicant was convicted at Middlesex Sessions on July 30, 1957, of larceny from the person and was sentenced by the Deputy-Chairman (Harold Williams, Esq.) to three years' corrective training.

At the trial the appellant set up an alibi which he had not disclosed before and gave evidence that at the time of the crime he was at a swimming-bath. He called as a witness a girl who said that she had seen him there at the material time. At the conclusion of the speeches of counsel the court adjourned for the day, and the Deputy-Chairman intended to commence his summing-up, but when the court sat on the next day counsel for the prosecution informed the Deputy-Chairman that in the

1957
Nov. 11

DAVID FLYNN

Goddard L.C.J., Gorman J., Pearson J.

meantime the prosecution had been in touch with the girl's employer, who would give a different account of the girl's movements at the material time. He asked for and obtained leave to call the employer by way of rebutting evidence. The employer stated at the material time the girl was in his shop.

R. D. L. Du Cann, for the applicant. This application raises a pure question of law, and the court is asked to treat it as a final appeal. It is submitted that, in permitting rebutting evidence to be called by the prosecution at so late a stage in the case, the Deputy-Chairman departed from the recognised rules of procedure: OWEN, 36 Cr.App.R. 16; [1952] 2 Q.B. 362 and WILSON (1957) 41 Cr.App.R. 226. These cases lay down an absolute rule so far as evidence for the prosecution is concerned. A less strict rule may obtain in the case of evidence for the defence, where there has been unavoidable delay in obtaining the presence of the witness: SANDERSON (1953) 37 Cr.App.R. 32.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The appellant applied for leave to appeal, but the point that was desired to be raised on his behalf by Mr. Du Cann, who has put the matter very properly to the court, was a pure question of law, and he asked, therefore, that this application should be treated as an appeal. We acceded to that request, and we will, therefore, deal with the application on the basis that it ought to have been listed as an appeal and treated as such, and we do not require that it should be argued by counsel for the prosecution, because, with all respect to Mr. Du Cann's very earnest argument, the matter is, in our opinion, now beyond doubt.

The point is this: The applicant was charged with larceny from the person, and when the case came to be tried he set up the familiar defence of an alibi. Alibis which are set up at the last minute and have never been indicated before are always open to the gravest suspicion. If a defendant has a genuine alibi, that is to say, if he is told that he is charged with

1957
Nov. 11

DAVID FLYNN

Goddard L.C.J., Gorman J., Pearson J.

committing an offence in London on such-and-such a day and he knows that he was at Manchester on that day, the first thing he would do would be to tell the police: " You are quite wrong; I was at Manchester, and I will tell you all about it." Instead of that, a prisoner often reserves his defence and then a great number of witnesses are called, sometimes family witnesses and sometimes witnesses outside the family, to say that the person was never at the scene of the crime at all. Of course, when an alibi is set up at the last moment, the prosecution very seldom have any opportunity of testing its truth. As one has had to observe before now, criminal trials are not a game. The object of a criminal trial is to acquit the innocent and convict the guilty.

In this particular case the appellant, who was no novice to the criminal law and was represented, did not set up a word of his alibi until he came to give evidence at the sessions. The prosecution knew that he denied that he was the man concerned, and that might indicate that he would set up an alibi, but the prosecution did not know what the alibi was going to be. It turned out to be that he was at a swimming-bath from 9.45 a.m. to 2.30 p.m. It was during that time that the offence was committed. A girl named Barbara Pearce came to give evidence that she was at the swimming-bath between 10.30 a.m. and 12 noon and saw the appellant there and, if her evidence was right, he could not have been the person who committed the offence. Very often the most charitable view which one can take of witnesses who come to give evidence of alibi—frequently in the teeth of other evidence—is that they mistake one day for another. The girl was challenged by the prosecution that her evidence was not correct. The girl's evidence was given fairly late in the day and the Deputy-Chairman, knowing that he would have to sum up in some detail, adjourned the case to the next day. During that time it was found out that the girl worked at a shop, and that her employer was prepared to say, and give reasons for it, that she was at the shop during all the time when she said she was at the swimming-bath. Next day the prosecution asked and

1957
Nov. 11

DAVID FLYNN

Goddard L.C.J., Gorman J., Pearson J.

obtained leave to recall the employer to rebut the evidence which the girl had given.

Whatever has been the view in the past—and there were cases which perhaps were not reconcilable—since OWEN, 36 Cr.App.R. 16; [1952] 2 Q.B. 362 the court has laid it down that the question whether rebutting evidence is to be allowed or not is one for the discretion of the presiding judge. In OWEN's case (*supra*) the conviction was quashed on the ground that evidence was called when the whole case had been concluded except for verdict and judgment. The jury were enclosed, but they came back and asked the learned judge a very material question, and the learned judge allowed fresh evidence to be given in answer to that question. We held that that was wrong and that the conviction could not be upheld. We gave the same ruling recently in WILSON (1957) 41 Cr.App. R. 226 on the ground that, once the whole case was concluded and left to the jury and the jury were enclosed for the purpose of considering their verdict, it was for the jury to say on the evidence which had been given whether the prosecution had proved their case or not. But this case had not got so far; it had got to the close of the evidence and the speeches were finished, but the Deputy-Chairman had still to sum up. We laid it down quite clearly in OWEN's case (*supra*) that whether or not rebutting evidence should be called to clear up some matter arising out of the defence was a question for the discretion of the presiding judge. In our opinion, if in the case of an alibi evidence comes into the possession of the prosecution at a late stage, it ought, as a general rule, to be admitted, unless the alibi has been set up earlier. If an alibi has been set up earlier and the prosecution have had an opportunity of testing it, the presiding judge would say: " You have known all about this alibi all the time. I am not going to allow you to call evidence to rebut it. You might have called any relevant evidence in chief." But when the alibi is set up for the first time at the trial, even if the prosecution know or suspect that it is going to be set up, in nearly every case they cannot know what the alibi is going to be. If it has never been disclosed, they ought to be allowed to give rebutting evidence, which the jury may accept or not.

In this case the jury did disbelieve the alibi and convicted the appellant. The learned Deputy-Chairman had a discretion whether to allow the rebutting evidence to be called, and we can find no ground for saying that he exercised it in such a way as calls for interference by this court. The appeal is, accordingly, dismissed.

Appeal dismissed.

[CENTRAL CRIMINAL COURT CASE]

BEFORE

MR. JUSTICE SLADE

R. *v.* JOYCE

1957
Nov. 11

Evidence—Statement—Admissibility—Defendant Told by Police Officer " I Need to Take a Statement from You "—No Inducement Relating to Charge or Accusation.

A police officer, who had gone to the defendant's house for the purpose of investigating complaints of incest and indecent assault against him, invited the defendant to accompany him to the police station, saying, " I need to take a statement from you." The defendant, believing that he had no choice in the matter, accompanied the police officer to the station, and there made a statement and certain oral answers to questions put to him by the police.

Held, that the statement and oral answers were admissible in evidence, inasmuch as the words " I need to take a statement from you," or even words covering a suggestion that the defendant would have to come to the police station because the police needed to take a statement from him there, were not an inducement in any way relating to the charge or accusation.

Trial before Slade J. and a jury.

The defendant, John Stanislaus Joyce, was charged on an indictment containing two counts alleging incest with his daughter aged fifteen, and two counts alleging indecent assault on her. On the morning of Sunday, July 28, 1957, the daughter lodged a complaint against the defendant at Clapham Police Station. At about 11.30 p.m. on the same day Detective-Inspector Carter and another police officer called at the defendant's house. They told him that they were police officers investigating a complaint made against him by his daughter and invited him to accompany them to the police station. The inspector was alleged to have said: " I *need* to take a statement from you." The defendant, who had at once denied his guilt, finally agreed to go to the police station, where he made a statement which he refused to sign, and also made subsequent oral replies to questions by the police which, the prosecution alleged, afforded corroboration of the girl's evidence. The appellant was arrested in September, 1957.

When it was proposed to put the statement and oral answers in evidence at the trial, defending counsel submitted that they were inadmissible on the ground that the words used by the inspector, " I *need* to take a statement from you," amounted to an inducement held out by a person in authority.

J. H. Buzzard and *M. Worsley*, for the prosecution.
A. S. Wells, for the defence.

Slade J. I have considered the submission at some length because it is disquieting for anyone who has to try a number of sexual cases to observe, on the one hand, the proportion in which an acquittal takes place through lack of corroboration and because of the warning which the judge is bound to give to a jury and, on the other hand, the number of cases where corroboration is found in some oral statement alleged to have been made by the accused and to constitute an admission which, if put into the context for which the defence contends, may well have amounted to a denial or at least to no more than a colourless explanation of his alleged conduct.

The objection to the admissibility of the evidence in the present case arises in this way. Certain incidents were alleged by the complainant which culminated in an incident on the morning of Sunday, July 28, 1957. Later that day the complainant went to the police station and made certain allegations against her father. At 11.30 p.m. two police officers called at the defendant's house, and after stating who they were and explaining the nature of their business and having had some conversation with him, in which he denied the allegations that his daughter had made against him at that stage, and having made a search of his clothing, invited him (to use a neutral word) to accompany them to Clapham Police Station.

The defendant, who had been in bed, had been awakened and had hastily put on a pair of trousers over his pyjamas. He had been working all that day, although it was a Sunday, and, being not unnaturally reluctant to turn out at that hour of the night, demurred at first to accompanying the officers to the police station, but then said: "All right, I will come with you then, she has been stopping out, you know, and she has been telling lies. I have had to chastise her." That is according to the police evidence. Then, again, according to the police evidence, which on this point is rather more favourable to the defendant than his own evidence in the witness-box in the absence of the jury on the issue of admissibility, Detective-Inspector Carter told the defendant, and he was confirmed in this by Detective-Sergeant Coleman, that he would *need* to take a statement from him. I think it is right to say that the defendant probably would not even have accompanied the police officers to the station if he had not thought, rightly or wrongly, that (to use his own words) he had very little choice in the matter, and I will assume that that was the reason why he did so. I think that it is, further, fair to say that the defendant might very well have refused to answer any questions at all, even the formal ones about the members of his family and their ages and who occupied the bedrooms and so forth, if he had not been previously told: "I need to take a statement from you."

1957
Nov. 11

R. *v.* Joyce

Slade J.

The question which I have to ask myself is whether that is a sufficient inducement in law to exclude any admission thereafter alleged to have been made by the defendant. That it is an inducement of some kind, of course, is manifest. A man would not normally leave his house to go to the police station about midnight if he had not been asked to do so in such terms that he thought he had no choice in the matter, and that must, of course, mean that there was an inducement operating on his mind to make him go. If a man makes a statement after being told "I need to take a statement from you," then obviously some inducement in the colloquial sense is held out to him to make it, but an inducement of that nature is not a sufficient inducement in law to render inadmissible a statement resulting from it. To render a confession or admission admissible, the prosecution must prove affirmatively that no inducement *relating to the charge or accusation* was held out to the defendant to make it; a confession or admission must be excluded if it is made: (i) in consequence of (ii) any inducement (iii) of a temporal character; (iv) connected with the accusation or relating to the charge (v) held out to the accused by a person with some authority over the subject-matter of the charge or accusation.

In my judgment, the words "I need to take a statement from you," or even words covering a suggestion that you will have to come to the station because we need to take a statement from you when we get there, are not an inducement in any way relating to the charge or accusation. The prosecution, therefore, have satisfied me that evidence of the oral admissions alleged to have been made by the defendant is admissible.

[The trial then proceeded, and the jury returned a verdict of Not Guilty.]

Solicitor: Alexander Kassman, for the defendant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DEVLIN
AND MR. JUSTICE PEARSON

DENNIS HOWARD

1957
Nov. 18

Psychiatrist's Report on Prisoner in Custody—How Far to be Used. Evidence—Admissibility—Argument on Objection before Case Opened.

It is undesirable that the report of a psychiatrist who has examined a prisoner in custody should be given either to the prosecution or the defence unless a question of insanity is raised. Where no such question is raised, it is not proper for counsel to use such a report for the purpose of examination or cross-examination.

Observations on an objection to the admissibility of evidence being argued before the opening of the case.

The appellant was convicted at Worcestershire Assizes on October 18, 1957, of capital murder and was sentenced by Hinchcliffe J. to death.

Prior to the opening of the case, the admissibility of evidence relating to an alleged visit by the appellant to the scene of the crime on an earlier occasion was argued. While the appellant was in a prison he was examined by a psychiatrist, and a copy of the psychiatrist's report was given to both prosecuting and defending counsel. During the course of the appellant's evidence, in view of one of his answers in cross-examination, a question was put to him by counsel for the prosecution based on the report.

R. G. Micklethwait, Q.C., and *Stephen Brown,* for the appellant.

G. G. Baker, Q.C., and *Patrick Medd,* for the Crown were not called on to argue.

1957
Nov. 18

DENNIS HOWARD

Goddard L.C.J., Devlin J., Pearson J.

THE LORD CHIEF JUSTICE: The appellant was convicted of capital murder before Hinchcliffe J. at the last assizes for Worcestershire. The offence was alleged to be capital murder because it was a killing, which was not denied, with a firearm and it was done in the course of theft. It was a case in which, as far as I can see from the evidence, it could not be disputed that it was a planned killing. There was a planned use of a firearm in the course of a shop robbery, the circumstances being that the appellant, who had a collection of firearms and ammunition at the place where he lived, went to a shop at Dudley and asked the shopkeeper to show him a sweater. He evidently wanted to steal a sweater, and when the shopkeeper brought down a sweater, the appellant produced a Mauser pistol which he had loaded and cocked before he went into the shop. He tried to take the goods without paying for them, and pointed the pistol at the shopman, and his own account was that the shopman came forward and tried to seize him, and thus was shot.

The only defence was that the pistol went off by accident. In the circumstances it was the only possible defence, but the circumstances show how strong the deliberation was. At any rate, that was a matter for the jury, and the jury convicted, and we could not possibly say—indeed, we are not asked to say—that it was an unreasonable verdict. It was the only verdict that fitted in with the facts of the case given not only by the prosecution but by the appellant himself, because he said: " I went into the shop with the intention of robbery. I had an automatic pistol. I cocked it before I went into the shop." What other inference is to be drawn than that he meant to use it, if necessary, to carry out his purpose and if the shopman tried to prevent him?

A variety of points have been taken by Mr. Micklethwait, and of course it is his duty in a capital case to take every point that he can find, but in the opinion of the court there is no substance in any of these points. Apparently a long discussion took place before the learned judge before the case was opened on the question whether certain evidence was admissible or not.

1957
Nov. 18

DENNIS HOWARD

Goddard L.C.J., Devlin J., Pearson J.

One does not want to lay down invariable rules, because one can see cases where, if the prosecution announce their intention of calling some witness to prove system and an objection should be taken that it is not a case in which system would be held to be relevant, it might be convenient to take an objection there and then. In this case the position was different. Various points were submitted to the learned judge, and his ruling was asked on them, more particularly with regard to a matter which related to a previous visit by the appellant to Dudley in company with two other people who were also armed. What exactly was the object of their going there, I do not know, because the evidence was not given, but the learned judge did express the opinion that the evidence would be prejudicial, by which I suppose he meant that, though it might be admissible, it would be so prejudicial that the prejudice would outweigh the value of the evidence. He said that he would not admit the evidence, but he added that it might be different if the defence was one of accident, as it turned out to be. However, as far as we can see, none of this evidence with regard to the previous visit to Dudley was given, except that a witness was called who said that he had been with the appellant to Dudley and had seen the gun in his possession, but their object in going to Dudley was never given in evidence. There was one question put by Mr. Baker, which he told the witness not to answer in order that Mr. Micklethwait might have a chance of objecting, which he did. The question was: " On the night that you had the gun out at Dudley when you were out with Aston and the other man, what did you do? " The appellant was asked that question, and the learned judge, in accordance with the ruling he had given earlier in the case, ruled it out, and we cannot say that, because that question was asked, it necessarily brought to the mind of the jury that the appellant had committed an offence at Dudley. I do not know whether he had; it may be that they had gone there with the intention of doing something which they never did and, as has been pointed out in the argument, this really all becomes irrelevant, because the issue for the jury was whether the shooting which took place on May 16 was deliberate or accidental. Whether he had gone to Dudley the day before or at some time matters not, and it became all the more irrelevant because the appellant admitted that he cocked the weapon before he went into the shop. The Criminal Evidence Act, 1898, forbids such a question being asked, and says that, if it is asked, the prisoner shall not be compelled to answer, but that is very far from saying that, because a question which turns out to be irrelevant is asked, as are many questions in cross-examination, that would be a ground for quashing the conviction.

Another point was made that the learned judge in summing up read out two words in the appellant's statement, the agreement being that they were to be struck out. The appellant said: " Please put down no one was with me either time." There is no particular significance to be given to the words " either time." It cannot possibly be said that that did any harm, because by this time the issue was perfectly plain: Was the shooting accidental? and whether the appellant had been to Dudley to commit theft or burglary on another occasion did not make any difference when once it was admitted that there was a killing in the course of robbery and the only question was whether the killing was accidental.

Then our attention has been called to the fact that a question was put to the appellant when he was denying something. He was being asked whether he had not forced the shop assistant's hands behind his back, and an expression was used, and Mr. Baker said: " That has a familiar ring, has it not?" Mr. Micklethwait says that that expression was taken from a psychiatrist's report, the terms of which apparently he knew and Mr. Baker knew. It is not for this court to say whether psychiatrists are to examine persons in prison or not; that is a matter for the Secretary of State and the Regulations. But what we do say is that, if an attempt is made to use a psychiatrist's report by reading from it to a prisoner, that would not be a proper thing to do. If in the opinion of the prosecution or in the opinion of the defence the psychiatrist can give material evidence, the psychiatrist must be called and then the question can be decided whether, if he is called by the prosecution to prove an admission made by the prisoner, the statement can properly be given in evidence or whether it might have been given under the seal of confidence or in consequence of a question which would violate the Judges' Rules. In the opinion of the court, it would be very much better if psychiatrists' reports were regarded as confidential and were not given to the prosecution or the defence, unless a question of insanity is raised and the evidence is material. We cannot find that anything wrong was done here with regard to the psychiatrist's report. The case was, at any rate, a very strong one. Once the appellant admitted that he went into the shop with a revolver which he had cocked beforehand, there was abundant evidence on which the jury could find a verdict of murder. They found a verdict of murder and there is no ground on which this court can interfere, and the appeal is dismissed.

Appeal dismissed.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DEVLIN
AND MR. JUSTICE PEARSON

R. *v.* OLIVER

1957
Nov. 25;
Dec. 3

Venue—Postponement of Trial—Jurisdiction—Direction that Trial Should Take Place at Next Assize but One in Different County—Criminal Justice Act, 1925 (14 *&* 15 *Geo.* 5, *c.* 86), *s.* 14 (2)—*Administration of Justice (Miscellaneous Provisions) Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 63), *s.* 11 (3)—*Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 10 (2).

By section 14 (2) of the Criminal Justice Act, 1925: "Where for any reason whatsoever the trial of a person who has been committed to be tried for an indictable offence before a court of assize or quarter sessions for any place is either not proceeded with or not brought to a final conclusion before that court, it shall be lawful for that court, if in its discretion it thinks it convenient so to do with a view either to expediting the trial or re-trial or the saving of expense or otherwise and is satisfied that the accused will not thereby suffer hardship, to direct that the trial or re-trial of the accused shall take place before a court of assize, or (if the offence is within the jurisdiction of a court of quarter sessions) before a court of quarter sessions for some other place." By subsection (5) [replaced by the Magistrates' Courts Act, 1952, s. 10 (2)]: " Where a person is to be committed on bail for trial before a court of quarter sessions for any county or borough, and the next quarter sessions for that county or borough are due to be held within five days, the court may commit him to the next quarter sessions but one."

The power given by section 14 (2) is limited to sending a case for trial to the *next* assizes or quarter sessions for the " foreign " place, and there is no power to send the case to a later assize or quarter sessions (except as provided in section 10 (2) of the Magistrates' Courts Act, 1952).

Where removal to another court is sought on the ground of prejudice, and there is any doubt with regard to a suitable court to which to send the case, a convenient course is to discharge the jury and order trial at the next assizes or quarter sessions for the county or city where the indictment has been preferred, leaving it to the prosecution or defence to apply to the Queen's Bench Division under section 11 (3) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, for an order for change of venue.

Motion for an order directing change of venue.

On November 4, 1957, the trial of the respondent, John Henry Walter Oliver, for murder began at Exeter Assizes before Salmon J. In reports of the opening speech of counsel for the prosecution in three national newspapers matters were included which counsel had deliberately refrained from opening, though they had been given in evidence and published in the local press during the magisterial proceedings. Those matters had formed part of the statement which, it was alleged, the respondent had made to the police. Salmon J. decided to discharge the jury in case any of them had seen those inaccurate reports which, in his opinion and that of counsel on

1957 *Nov.* 25; *Dec.* 3

R. *v.* OLIVER

Goddard L.C.J., Devlin J., Pearson J.

both sides, were highly prejudicial. He also directed that the trial should take place away from Exeter at the assizes for the County of Southampton and, at the suggestion of counsel for the respondent, not at the autumn assizes in December, 1957, but at the winter assizes in March, 1958. The Attorney-General moved, under section 11 (3) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, for an order directing the trial to take place at the next session of the Central Criminal Court.

The Attorney-General (*Sir Reginald Manningham-Buller*, Q.C.) (*E. S. Fay*, Q.C , *Rodger Winn* and *Michael Hoare* with him), for the Crown. The order of Salmon J. was invalid, as under section 14 (2) of the Criminal Justice Act, 1925, there was no power to commit to the next assizes but one at Winchester. There was power to commit to the next Exeter Assizes or to some other assize on the present circuit. In any event, a postponement till March, 1958, was undesirable. Such delay might, among other things, affect the recollection of witnesses.

Norman Skelhorn, Q.C. (*H. E. Park* with him), for the respondent. The order of Salmon J. was valid. He had a discretion and exercised it judicially. The course which is now sought by the Attorney-General to be adopted might deprive the accused person of a fair trial. The matter published in the press was highly prejudicial, and the discharge of the jury or the stopping of the case at Exeter gave the matter further publicity. Time should be allowed for the prejudice caused to die down. If the court thinks it right to alter the order made by Salmon J. it is desired that the case be tried at Winchester.

At the conclusion of the arguments the Lord Chief Justice said that the court would direct the trial to take place at the next session of the Central Criminal Court and that they would put the reasons for their decision into writing.

Cur. adv. vult.

1957
Nov. 25;
Dec 3

R. *v.* Oliver

Goddard L.C.J.,
Devlin J.,
Pearson J.

Dec. 3. The following judgment was read by

The Lord Chief Justice: The judgment I am about to read is the judgment of the court.

On November 4, 1957, the trial of John Henry Walter Oliver for murder began at the Exeter City Assize before Salmon J. The next morning counsel for the Crown called the attention of the learned judge to reports of the previous day's hearing, which had appeared that morning in three national newspapers which circulated in Exeter. In the report of counsel's opening speech matters were included which in fact counsel had deliberately refrained from opening, though they had been given in evidence and published in the local press during the magisterial proceedings. These matters had formed part of the statement which, it was alleged, the prisoner had made to the police, but in his discretion counsel had decided not to refer to them in opening, and whether they would or would not have come out in the course of the trial is immaterial. When this was brought to his notice, the learned judge decided to discharge the jury in case any of them had seen these inaccurate reports which, in his opinion and in that of counsel for the Crown and defence, were highly prejudicial. The learned judge also directed that in these circumstances the trial should take place away from the City of Exeter, and after discussion with counsel for the defence he directed that the trial should take place at the assizes for the County of Southampton, not at the forthcoming autumn assize but at the winter assize, which will not be held till March, 1958. While, no doubt, counsel for the prosecution agreed that it was desirable that the case should be tried elsewhere than in Exeter, he took no part in the discussion as to where or when it should be tried, but offered no opposition to the order which was made.

The Attorney-General now moves this court under section 11 (3) of the Administration of Justice Act, 1938, for an order directing the trial to take place at the next session of the Central Criminal Court. That subsection is in these terms: "If it appears to the High Court to be expedient in the interests of justice, the court may direct that an indictment or inquisition shall, instead of being tried at the court of assize or quarter sessions at which it would but for the direction be tried, be proceeded with and tried at such other court of assize, or, if the offence is within the jurisdiction of quarter sessions, at such other court of quarter sessions, as may be specified in the direction."

In making the order which he did the learned judge was relying on section 14 (2) of the Criminal Justice Act, 1925, which reads as follows: "Where for any reason whatsoever the trial of a person who has been committed to be tried for an indictable offence before a court of assize or quarter sessions for any place is either not proceeded with or not brought to a final conclusion before that court, it shall be lawful for that court, if in its discretion it thinks it convenient so to do with a view either to expediting the trial or re-trial or the saving of expense or otherwise and is satisfied that the accused will not thereby suffer hardship, to direct that the trial or re-trial of the accused shall take place before a court of assize, or (if the offence is within the jurisdiction of a court of quarter sessions) before a court of quarter sessions, for some other place."

It is only right to say that it was at the suggestion of counsel for the defence that the learned judge ordered the case to go to the winter assize. From the shorthand note it appears that counsel expressed doubt whether it would be possible for the case to be tried at the forthcoming autumn assize where there is already a heavy calendar and before this court he contended that by next assize there would not be enough time for any prejudice to die down. This is not a ground which appeals to this court. We think it is almost fanciful to say that jurors in Hampshire would have been so interested in a trial for murder at Exeter that, if they had read the reports in any of these papers, they would remember the details so that they could not be trusted to try the case impartially. It is perhaps worth remembering what Lord Denman said as long ago as 1833 in HOLDEN, 5 B. & Ad. 347, at p. 355: "When men are summoned into a jury box to decide upon a case of felony, such prejudice is very apt to die away: it is a kind of feeling which juries are learning more and more to lay aside; and we should rather relax that disposition by being too ready to suppose that they would be influenced by unjust impressions." Moreover, according to the shorthand note, the ground on which the learned judge was asked to send the case to the winter assize was the possible difficulty of getting it tried at this assize owing to the pressure of business, but it is right that I should say that he did have in mind the possibility of prejudice still existing and he has also told us that he did not send the case to the Central Criminal Court partly because he thought that this was not looked upon with favour and partly because he was not asked to do so.

Now this court is of opinion that it has power to entertain the application of the Attorney-General even if it was a matter within the learned judge's discretion, but, if he had jurisdiction to make it, we should naturally be reluctant to interfere, especially as it was supported by the defence and no objection was taken by the prosecution when it was made. As we have said, the learned judge relied on section 14 (2) of the Act of 1925, but the Attorney-General contends that that section must be read as giving power to the court to direct trial at some other place than that to which the accused was committed, but only to the next assize for that place.

It must be remembered that this section made a considerable change in the law of venue and for the first time enabled a court of assize or quarter sessions to direct an indictment to be tried at a foreign court. For very many years statutory provision has been made for ensuring the prompt trials of persons charged with either felony or misdemeanour. Section 6 of the Habeas Corpus Act, 1679, contains stringent provisions to this end, so that a prisoner not tried at the next sessions or gaol delivery may claim to be released on bail and, if not tried at the following session, may be discharged. Section 27 of the Criminal Procedure Act, 1851, provides that the court may, on the application of a person indicted or otherwise, postpone the trial to the next subsequent session to give him time for the preparation of his defence or otherwise. The Assizes Relief Act, 1889, s. 3, provides for the discharge of a prisoner where he is not tried at the next quarter sessions, and subsection (5) of the Act of 1925 (replaced by section 10 (2) of the Magistrates' Courts Act, 1952) contains an express provision enabling the committal to be to the next quarter sessions but one and then only if the next sessions are to be held within five days of the date of committal and only if the accused is bailed. All these statutory provisions are, no doubt, for the protection of the accused and it may be contended that there is no reason why the direction should not be for trial to an assize subsequent to the next one if the accused consents. But section 14 of the Act of 1925 gives a new power to the court and, in our opinion, that power is to commit to some other place and must be limited to the next assizes or sessions for that other place. We cannot think that Parliament intended to give so wide a power as is contended for in this case, especially in view of the provisions for ensuring trials at the next assizes or sessions to which we have referred. As the matter is one of jurisdiction, consent cannot enlarge the power. Moreover, if the argument to the contrary which was addressed to us were to prevail, it would follow that it would be left to the discretion of the court either at the instance of the prosecutor or the defence to direct the trial to take place at any subsequent assize to be held for the county to which the indictment is sent, provided it was satisfied that the accused would not suffer hardship which might in most cases at least be avoided by granting bail, though the prosecution might be seriously hampered by the death or absence of witnesses. In our opinion, if this power of changing venue to a foreign court is exercised the case must be committed to the next assizes or sessions subject in the case of the latter to the provisions of subsection (5), as replaced by section 10 (2) of the Act of 1952, which would be an unnecessary subsection if the court always had that power under subsection (2).

We accordingly thought we ought to exercise our powers under section 11 (3) of the Act of 1938 and have already directed the trial to take place at the next session of the Central Criminal Court, that is to say, the present session, which began yesterday. While we do not encourage frequent recourse to that court as a place of trial as it is usually more than fully occupied with its own cases, charges of murder are generally regarded as an exception and ought to be tried as quickly as possible, and indeed before the Act of 1938, if a case had to be removed for trial on the ground of local prejudice, it was to the Old Bailey that it had to go: see Central Criminal Court Act, 1856 (19 & 20 Vict. c. 16), commonly called "Palmer's Act" and repealed by the Act of 1938. We may say for future guidance that where removal is sought on the ground of prejudice and there is any doubt as to the suitable court to which to send the case, it would be a convenient course for the court to discharge the jury and order a re-trial at the next assizes for the county or city where the indictment has been preferred, leaving it either to the prosecution or the defence to apply to this court for an order under section 11 (3) of the Act of 1938 when it has been ascertained at what court the case can conveniently and expeditiously be disposed of.

At the end of the hearing and after we had announced our decision we were asked to direct that no report of these proceedings should appear in the press, and we were referred to CLEMENT (1821) 4 B. & Ad. 218 as an authority enabling the court to give such a direction. That was a case in which several persons were to be tried separately in respect of the same offence, and the court did direct that no report of any one case should appear until all were tried. We do not think it necessary to decide whether that case would enable us to forbid the publication of such proceedings as these, because we are satisfied that no possible prejudice can be caused to the accused man, as no reference was made to the articles to which exception was taken during the hearing.

Solicitors: Theodore Goddard & Co., agents for Crosse & Crosse, Exeter, for the respondent.

BEFORE

MR. JUSTICE GLYN-JONES

R. *v.* SMITH AND OTHERS

1957
Nov. 11

Indictment—Manslaughter—Joinder of Other Counts.

Joinder of a count for manslaughter and counts for other offences in an indictment preferred by direction of the judge under s. 2 (2) (*b*) of the Administration of Justice (Miscellaneous Provisions) Act, 1933.

Trial at the Central Criminal Court.

The defendants Smith and Semaine were indicted jointly for manslaughter. In a second indictment containing four counts, the first count charged Smith and Semaine with larceny, and Candler as accessory after the fact to that offence; the second count charged Smith and Semaine with receiving stolen property and Candler as accessory after the fact to that offence; in the third count Candler was charged with receiving stolen property; in the fourth count E. G. Richardson and C. W. Richardson were charged with receiving stolen property. The witnesses to be called for the prosecution on each indictment numbered about thirty and were the same, except that two or three medical witnesses were required only on the indictment for manslaughter.

R. E. Seaton, E. J. P. Cussen and *Miss P. M. Coles* for the Crown.

R. A. Kaye, for the defendants Smith and Semaine.

P. A. G. Rawlinson, for the defendant Candler.

James Burge, for the defendant E. G. Richardson.

Victor Durand, for the defendant C. W. Richardson.

GLYN-JONES J., having directed that a bill of indictment be preferred, under the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 (2) (*b*) against all five defendants, in which Smith and Semaine were charged with manslaughter in count 1 and all five prisoners were charged in counts 2 to 5 with such offences as had been charged in the four counts of the original second indictment, gave the following judgment.

In this case depositions were taken before examining magistrates and at the close of the hearing the accused Smith and Semaine were committed for trial on a charge of the manslaughter of George Benjamin Day and all the defendants, including Smith and Semaine, were committed for trial on charges of stealing or receiving a lorry or the lead which was loaded on it.

Separate indictments were preferred in this court, an indictment against Smith and Semaine for manslaughter, and a separate indictment against them and the others containing various counts charging stealing or receiving. Having inquired from counsel for the prosecution, I learned that, if these two indictments were tried separately, as they would have to be since they were separate indictments, it would be necessary for the prosecution to call in each trial almost the whole of the evidence that would have to be called in the other trial; that is to say, in particular, on the trial of Smith and Semaine and the others for stealing the lorry and lead or for receiving the lead, almost the whole of the evidence on which the prosecution would ask the jury to convict on the charge of manslaughter would have to be called. It seemed to me that it would be a great waste of time and money that all that evidence should be called twice, and I formed the opinion that it would be desirable in the interests of justice and in the public interest that all the matters alleged against these defendants should be heard and disposed of in one trial, but a technical difficulty arises.

It was not, as I saw it, possible to amend the indictment for manslaughter by including in the indictment the charges of stealing and receiving, nor did I think it right to amend the indictment for stealing and receiving by adding the charge of manslaughter, and it therefore seemed to me, having read the depositions, that the proper course was to grant leave for a bill to be preferred against all these defendants, in which there should be included a charge of manslaughter against Smith and Semaine. That has been done and this trial will proceed on that indictment.

A further question arises, whether or not the provisions of s. 13 (3) of the Criminal Justice Act, 1925, apply, so as to enable the depositions of those witnesses who were conditionally bound over to be read on this trial. I have come to the conclusion that this is a trial of persons who have been committed for trial for offences, in the case of Smith and Semaine of manslaughter, and in the case of all of them of stealing or receiving, as the case may be. The trial takes place, therefore, on the charges on which all of these defendants have been committed, each has heard the evidence given by the witnesses conditionally bound over, each has had the opportunity to cross-examine, and I rule that, all the defendants having been committed for trial for the offences with which they are now charged, the depositions of Det.-Sgt. Merry and other witnesses conditionally bound over may now be read. Any other decision would cause, in my opinion, a wholly unjustified waste of public time and money.

The count of manslaughter was withdrawn by direction of the judge during the course of the trial. Smith and Semaine were convicted of larceny, and Candler of being accessory after the fact to larceny and of receiving. The two Richardsons were acquitted.

Solicitors: R. G. Freeman & Co. for the defendants Smith and Semaine; Prothero & Prothero for the defendant Candler; Brian Rees & Co. for the defendants E. G. Richardson and C. W. Richardson.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DEVLIN
AND MR. JUSTICE PEARSON

1957
Dec. 10

HUSSEYIN IBRAHIM
AETTIN RENZE
OSMAN SULEYMAN
AHMET SULEYMAN

Committal for Trial—Indictable Offence Triable Summarily with Prisoners' Consent—Summary Trial Embarked Upon—Plea Received and Opening Speech for Prosecution Heard—No Evidence Heard—Subsequent Decision to Commit for Trial—When Magistrate "Begins" to Try Information for Indictable Offence Summarily—Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *ss.* 19 (5), 24.

The appellants appeared before a magistrate charged with unlawful wounding, which is an indictable offence triable summarily with the consent of the accused. The representative of the prosecution outlined the case and asked for summary trial, to which the appellants consented and pleaded Not Guilty. The magistrate accordingly embarked on summary trial of the informations, but on hearing the full facts from the opening speech of the prosecution, decided that he would not proceed with summary trial, took depositions, and committed the appellants for trial. A count for wounding with intent was included in the indictment, under the proviso to section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, as being founded on facts or evidence disclosed in the depositions. The appellants were convicted on this count, and contended that their committal for trial was invalid on the ground that the magistrate, having begun to try the case summarily, could not alter his mind and decide to commit for trial.

Held, that a magistrate does not "begin" to try an information for an indictable offence summarily within the meaning of sections 19 (5) and 24 of the Magistrates' Courts Act, 1952, until he begins to hear evidence; that it was open to the magistrate to change his mind and commit for trial at the stage of the proceedings at which he did; and that the committal for trial was valid and the convictions must be affirmed.

R. *v.* CRASKE, *ex p.* METROPOLITAN POLICE COMMISSIONER [1957] 3 W.L.R. 308 followed and applied.

1957
Dec. 10

HUSSEYIN IBRAHIM, AETTIN RENZE, OSMAN SULEYMAN, AHMET SULEYMAN

Goddard L.C.J., Devlin J., Pearson J.

Appeals against conviction.

The appellants were convicted at the Central Criminal Court on October 7, 1957, of wounding with intent and were each sentenced by the Common Serjeant to nine months' imprisonment.

The appellants appeared at a metropolitan magistrate's court on informations charging them with unlawful wounding. The representative of the prosecution outlined the facts to the magistrate and asked for summary trial, and the magistrate intimated that he would be prepared to deal with the informations summarily if the appellants consented. All the appellants asked for summary trial and pleaded Not Guilty. After the full facts had been opened by the representative of the prosecution, and before any evidence had been called, the magistrate said that he was not prepared to deal with the case summarily. He accordingly took depositions and committed the appellants for trial. A count for wounding with intent, contrary to section 18 of the Offences against the Person Act, 1861, was included in the indictment under the proviso to section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, as being founded on facts or evidence disclosed in the depositions.

J. G. Haines, for the appellants. The magistrate, having begun to try an indictable offence summarily, was not entitled to change his mind and commit for trial, and the committal was, accordingly, invalid. The words " shall proceed to summary trial " in section 19 (5) of the Magistrates' Courts Act, 1952, should be construed strictly and give the magistrate no option. The case of R. *v.* CRASKE, *ex p.* METROPOLITAN POLICE COMMISSIONER [1957] 3 W.L.R. 308 will doubtless be relied on by the Crown as showing that the magistrate, at the time when he decided to commit for trial, had not " begun " to try the case, but the present case can be distinguished by reason of the fact that the proceedings had advanced a stage further in that the magistrate had heard not only the appellants' pleas but also the opening speech for the prosecution.

1957
Dec. 10

HUSSEYIN IBRAHIM, AETTIN RENZE, OSMAN SULEYMAN, AHMET SULEYMAN

Goddard L.C.J., Devlin J., Pearson J.

J. Hazan, for the Crown. The committal for trial was valid, the present case being covered by R. *v.* CRASKE, *ex p.* METROPOLITAN POLICE COMMISSIONER (*supra*). The test whether a magistrate has "begun" to try an indictable offence summarily within the meaning of section 24 of the Magistrates' Courts Act, 1952, is whether he has heard evidence, and here the magistrate had heard none.

THE LORD CHIEF JUSTICE: The appellants appeal to this court on the ground that they were wrongly committed for trial, and the whole point put before the court is that they had elected summary trial when they were brought before the learned magistrate and that the learned magistrate had begun the hearing of the case and therefore under section 24 of the Magistrates' Courts Act, 1952, was bound to continue summary trial and could not change his mind and commit for trial.

When the appellants were brought before the magistrate on a charge of unlawful wounding, which is an offence which, although indictable, a magistrate may try summarily with the consent of the accused, the facts were outlined to the magistrate and the prosecution consented that the case should be tried summarily. Thereupon the magistrate followed the procedure under section 19 of the Act. After the charge had been read to the appellants they were asked if they elected to be tried summarily, and they answered that they did, and then the facts were opened on behalf of the prosecution to the learned magistrate. When he heard the full facts he said he was not going to try the case summarily, because it was too serious, and he committed the appellants for trial. A count under section 18 of the Offences against the Person Act, 1861, for wounding with intent, that is, feloniously wounding, was subsequently included in the indictment. The whole question put to us is whether the decision to commit for trial was not too late and whether under section 24 of the Act of 1952 the magistrate was not bound to continue the summary hearing of the case.

Speaking for myself, I think this point is entirely decided by a decision of the Divisional Court, which we should naturally follow except for the most compelling reasons. Whether it is technically binding on this court I need not stay to inquire, but certainly in the past this court has been accustomed to follow decisions of the Divisional Court, just as the Divisional Court has been accustomed to follow decisions of this court. This case is entirely covered by R. *v.* CRASKE, *ex p.* METROPOLITAN POLICE COMMISSIONER [1957] 3 W.L.R. 308, which was decided only in February, 1957. That case undoubtedly decided that the magistrate had not begun to try the case within the meaning of section 24 of the Magistrates' Courts Act, 1952, until he had begun to hear evidence. CRASKE'S case (*supra*) was a case in which a defendant had been charged with an offence before a learned metropolitan magistrate and had elected summary trial. He then came before the magistrate on remand. The case had not been proceeded with on the day when he made his election, and on remand he asked for leave to withdraw his election and asked to go for trial, and it was contended that the learned magistrate had no power to allow him to do so. The Divisional Court held that the magistrate had power to allow him to do so, and that the defendant could withdraw his election because the magistrate had not begun the trial. The court said in the plainest possible terms that the magistrate did not begin to try the case until he had begun to hear the evidence, and that was the construction which the court put upon section 24 of the Magistrates' Courts Act, 1952. I do not think myself that we get much assistance by considering what happens where the trial takes place on indictment, because there is a particular code which enables indictable offences to be tried summarily in magistrates' courts, and the position is of course different, and different considerations arise from those which apply to the case where the prisoner is indicted and is tried on indictment. We need not consider, in my opinion, for the purposes of this case, whether on a trial at assizes or quarter sessions the trial begins when counsel opens the case. But I am satisfied, even

1957
Dec. 10

HUSSEYIN IBRAHIM, AETTIN RENZE, OSMAN SULEYMAN, AHMET SULEYMAN

Goddard L.C.J., Devlin J., Pearson J.

apart from CRASKE's case (*supra*) that under the provisions of sections 19 and 24 of the Magistrates' Courts Act the trial does not begin until the magistrate begins to hear the evidence, and there is a very good reason for that view, because it is not for the defendant to say whether he will be tried summarily. The defendant can say: "I will not be tried summarily," but he cannot say: "I will be tried summarily" if the offence is indictable. The question whether the defendant should be tried summarily or on indictment is a matter for the court to decide. It may be that the court sometimes will say: "Here is a charge. We will start on the basis that there is to be a trial on indictment, and we will consider when we have heard some of the evidence whether we will treat it as an indictable or summary offence." That, no doubt, could happen, but it may happen that the prosecution and the defence quite properly put their heads together and say: "We shall be quite content with a summary trial," but when the magistrate hears something about the facts he says: "I am not going to try this case; it is a serious case and I shall commit this case for trial."

I am content to base my decision in this case on the footing that it was decided quite unequivocally in CRASKE's case (*supra*) that until the magistrate begins to hear evidence section 24 does not apply. We are dealing here with a code which obtains in courts where magistrates can sit either as a court of summary jurisdiction or as examining magistrates, and we have to construe sections 19 and 24. The Divisional Court has construed section 24 in the way that I have indicated, and, in my opinion, it makes no difference in a magistrates' court that an advocate or the prosecutor may have begun to inform the magistrate of the evidence which he intends to call. I do not think that thereby the magistrate has begun to try the case. He has not begun to try the case till he begins to hear evidence. In this case he decided to commit for trial before he heard any evidence, only after hearing the facts in the opening.

For these reasons, I think the point fails and these convictions must be affirmed.

1957
Dec. 10

HUSSEYIN IBRAHIM, AETTIN RENZE, OSMAN SULEYMAN, AHMET SULEYMAN

Goddard L.C.J., Devlin J., Pearson J.

DEVLIN J.: It seems to me that there is only one point in this case, though Mr. Haines has sought to distinguish CRASKE's case (*supra*). In CRASKE's case (*supra*) the Divisional Court held that the magistrate had not begun to try the case within the meaning of section 24 merely because he had received the plea of the accused man. In this case it can be said that the magistrate had gone further; he had not only received the plea but had heard the opening speech for the prosecution. Is that a valid ground of distinction? In my judgment, it is not. In CRASKE's case (*supra*) both the Lord Chief Justice and Byrne J., although they were dealing with a case which had not gone further than the plea, expressed the view that the magistrate did not begin to try the case until he had begun to hear the evidence. One has to bear in mind that in considering trial in this connection we are considering it, as my Lord has pointed out, in connection with a special code of procedure. I can quite appreciate that it may be said that a trial begins immediately after arraignment. In some contexts that may be true or, in the case of a jury trial, it may begin when the accused is put in charge of the jury and the opening speech follows that, but we are considering the matter in its place in section 24 as one of the provisions relating to a rather complicated and elaborate code. Once one concedes, as one has to having regard to CRASKE's case (*supra*), that the trial does not begin immediately after arraignment, there being no question of putting anybody in charge of the jury, I agree with my Lord that the right point to take is the point at which the magistrate begins to hear the evidence.

PEARSON J.: I agree. Mr. Haines advanced the argument under section 19 (5) taken by itself that at a certain stage of the proceedings, that is to say after the court had decided under subsection (2) that it would proceed with a view to summary trial and after certain steps had been taken and after the accused had consented to summary trial, then the words "shall proceed to the summary trial of the information" were to be understood in a literal sense as thereupon compelling

1957
Dec. 10

HUSSEYIN IBRAHIM, AETTIN RENZE, OSMAN SULEYMAN, AHMET SULEYMAN

Goddard L.C.J., Devlin J., Pearson J.

the court to proceed to the summary trial and precluding the court from enquiring into the matter as examining justices. That was an argument which could certainly be put forward on that provision taken by itself, but then one has in the same Act section 24, which says: "Except as provided in subsection (5) of section 18 of this Act, a magistrates' court, having begun to try an information for any indictable offence summarily, shall not thereafter proceed to inquire into the information as examining justices." I have not been able to find that section 24 can have any meaning or apply to any situation unless it applies to the situations contemplated by subsection (5) of section 19 and subsection (4) of section 20. Moreover, it was decided in the case which has been mentioned, R. *v.* CRASKE (*supra*), that section 19 (5) has to be read together with section 24. Therefore, until the summary trial of the information has begun the court is still at liberty to enquire into the information as examining justices. I entirely agree with what has been said with regard to the meaning of the beginning of the trial of the information in this particular statute, and it does not necessarily apply to the position under other statutes or in relation to other proceedings. I therefore agree with the judgment proposed.

Appeals dismissed.

CIRCUIT CASE
[NORTH-EASTERN CIRCUIT]

BEFORE

MR. COMMISSIONER WRANGHAM

1957
Dec. 12

R. *v.* SINGH

Perjury—Affirmation—Sikh—Impracticability of Administering Oath According to Witness's Religion—Witness Permitted to Affirm—"Lawfully Sworn"—Oaths Act, 1888 (51 *&* 52 *Vict. c.* 46), *s.* 1—*Perjury Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 6), *ss.* 1 (1), 15 (2).

1957
Dec. 12

R. *v.* SINGH

Mr. Commissioner Wrangham

The defendant, a Sikh, was charged at assizes with perjury alleged to have been committed when he was a witness in proceedings in a magistrates' court. The defendant had a religious belief, the Sikh faith, and an oath sworn on the "Granth," the holy book of the Sikhs, would have been binding on him. The defendant never indicated that he wished to affirm instead of taking the oath, but as no copy of the "Granth" was available and as it was impracticable for the defendant to be sworn according to his religion, at the suggestion of the court he made an affirmation before giving his evidence.

Held, that s. 1 of the Oaths Act, 1888, permitted a witness to affirm instead of taking an oath only if he objected to taking an oath on one of the two grounds specified in the section; that affirmation was, therefore, not proper in the circumstances of the present case; and that as the witness had not been "lawfully sworn" in the magisterial proceedings within the meaning of s. 1 (1) of the Perjury Act, 1911, there was no case to go to the jury on the charge of perjury.

Trial on indictment at assizes.

The defendant, Pritam Singh, was charged at Leeds Assizes before Mr. Commissioner Wrangham and a jury with having committed perjury in proceedings against another person in Huddersfield Magistrates' Court, in which he was a witness. The defendant professed the Sikh faith, and an oath sworn on the "Granth," the holy book of the Sikhs, would have been binding on him. No copy of the "Granth" was available in the magistrates' court and it was, therefore, impracticable to administer the oath to the defendant in accordance with his religion. The defendant himself did not express any desire to affirm, but, at the suggestion of the court, he made an affirmation before giving his evidence.

At the trial, after certain evidence for the prosecution had been heard, it was agreed by both counsel that it would be idle to hear the whole of the evidence if the commissioner was of the opinion that the defendant had not been properly sworn in the magistrates' court, and it was submitted that the defendant had not been "lawfully sworn" within the meaning of section 1 (1) of the Perjury Act, 1911, in the magistrates' court and that there was, therefore, no case to go to the jury.

E. John Parris, for the defendant.
J. A. Cotton, for the Crown.

MR. COMMISSIONER WRANGHAM gave the following ruling: Members of the jury, the position is this. Strictly speaking, in a case of this kind, the duty of the prosecution is to bring before the court the whole of the evidence which they have and then, at the end of the evidence, it is open to counsel for the defendant to submit to me that for some reason or other there is no evidence to consider. Ordinarily I would then have to give a ruling on that submission and say either that there was evidence for you to consider or there was not, in which case I should have to direct you to return a verdict of Not Guilty. In this case it is agreed by both learned counsel that it would be idle to go through the formality of hearing the whole of the evidence if I were of opinion that the defendant was not properly sworn in the Huddersfield Magistrates' Court.

The charge against the defendant is that he committed perjury in the magistrates' court in a case against a man called Mohammed Ali. It is clear that the first thing that the prosecution have to prove, in order to establish their case, is that the defendant was lawfully sworn. They then have to prove that he said what they allege he did say. They then have to prove that what he said was untrue and untrue to his knowledge. But before we get to the question of what he said and whether it was true or not, we have, first, the question whether he was lawfully sworn. The evidence is that he was not sworn at all, but affirmed. There is an Act of Parliament [The Oaths Act, 1888, s. 1] which provides that any witness who wants to affirm, on the ground that he has no religious belief (because he is, for example, an atheist) or that his religious belief forbids him to take the oath (as, for example, in the case of a Quaker), can affirm instead of taking the oath. If there was any indication that the defendant fell into either of those two classes, his affirmation would be as good as his oath and he would be equally liable to be prosecuted for perjury. The evidence, however, is precisely the other way. The defendant has a religious belief, the Sikh faith; there is a form of oath which he would regard as binding on him as a Sikh; and, in any case, he never indicated that he wanted to affirm. The real reason why he affirmed instead of taking the oath was because it was impracticable in the magistrates' court to administer the Sikh oath. Apparently, the holy book of the Sikh religion is very difficult to procure and it was not available in the magistrates' court. You may think that, where it is found impossible or difficult that a man should be sworn according to the oath of his own religion, it would be reasonable if Parliament provided that he should be permitted by his own consent to affirm and that such affirmation should count as an oath, but Parliament has not yet so provided. In the circumstances, therefore, I am bound to direct you that there never would be evidence fit for you to consider on this charge, and I therefore ask you to return on my direction a formal verdict of Not Guilty on this indictment.

Verdict: Not Guilty.

Solicitors: Drabble & Stephenson, Huddersfield, for the defendant; Harry Bann, Town Clerk, Huddersfield, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DEVLIN AND MR. JUSTICE PEARSON

RICHARD CHARLES HART

1957
Dec. 18

Evidence—Previous Contradictory Statement by Witness—Denial by Witness—Right to Call Person to whom Statement Made—Criminal Procedure Act, 1865 (28 *&* 29 *Vict. c.* 18), *s.* 4.

The principle established statutorily by s. 4 of the Criminal Procedure Act, 1865, that if a witness gives evidence of a fact

1957
Dec. 18

RICHARD
CHARLES
HART

Goddard
L.C.J.,
Devlin J.,
Pearson J.

directly relevant to the issue (as distinct from a matter going only to credit), it can be put to him that he has on some previous occasion made a contradictory statement to another person, and that if he denies it, that other person can be called to give affirmative evidence of the statement, applies to statements of every kind and is not confined to statements on oath or by way of depositions or in writing.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on October 7, 1957, of wounding with intent to do grievous bodily harm and was sentenced by the Common Serjeant to five years' imprisonment.

At a party in a house in Rotherhithe the appellant attacked a man named Humphreys with a knife and wounded him very severely. The appellant's case was that he picked up the knife because Humphreys came at him with a bottle in his hand and struck him on the head and that he thus inadvertently flung out his arm with the knife in his hand and in that way inflicted the wound accidentally. The wound went right through Humphreys's lung from top to bottom. There were two witnesses who saw a part or a whole of the incident. One was a man name Cunliffe, who said that Humphreys had not got a bottle, and one was a man named Donovan, who said that, although he did not see that Humphreys had any bottle, he heard the sound of a bottle breaking.

Cunliffe was called as a witness for the prosecution and said that Humphreys had not got a bottle, and, when the matter was put to him in cross-examination, denied that he had told Donovan that Humphreys had got a bottle. Donovan was called as a witness for the defence, and counsel for the defence desired to ask him for his version of the conversation with Cunliffe, but the Common Serjeant refused to admit the evidence.

P. M. Blomefield, for the appellant. The Common Serjeant was wrong in refusing to admit Donovan's evidence with regard to the conversation between him and Cunliffe. Under section 4 of the Criminal Procedure Act, 1865, the defence were entitled to give affirmative evidence that the witness Cunliffe had on another occasion made a statement on a matter going directly to the issue contrary to his evidence at the trial. The Common Serjeant appears to have thought that the provisions of the section were limited to previous statements on oath or in writing, but the section contains no such limitation.

S. H. Noakes, for the Crown. Even if the Common Serjeant was wrong in placing too narrow a construction on section 4 of the Act of 1865 and if the court should be of opinion that the evidence of Donovan with regard to the statement made to him by Cunliffe ought to have been admitted, the case against the appellant was an overwhelming one and the court is asked to consider applying the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

DEVLIN J.: The appellant was convicted at the Central Criminal Court of wounding with intent to do grievous bodily harm and was sentenced by the Common Serjeant to five years' imprisonment.

[After stating the facts set out above His Lordship continued] There was a conflict of evidence on the point whether Humphreys had a bottle or not. If the jury had thought it necessary to make up their minds on that point, then, no doubt, they would have resolved the conflict. They might have considered that, whether Humphreys had a bottle or not, there was nothing whatever in the defence that by swinging around his arm the appellant inadvertently struck an accidental blow causing those serious injuries. If they did come to that view, they would have fortified themselves with the fact that not a word of this defence was mentioned by the appellant at the time when he made a statement in which he told what he afterwards said were lies. But assuming that they did think the point important, then that leads to the only point in the case upon which an appeal can be presented and that is this: the defence contended that Cunliffe, who had said in evidence-in-chief for the prosecution that Humphreys had no bottle, had in fact told Donovan that Humphreys had a bottle. Defending

BIBL. LONDIN UNIV.

1957
Dec. 18

Richard
Charles
Hart

Goddard
L.C.J.,
Devlin J.,
Pearson J.

counsel cross-examined Cunliffe and put that statement to him, and he denied it. When Donovan went into the witness-box, defending counsel desired to ascertain from Donovan in chief what was the substance of the conversation, and the learned Common Serjeant refused to admit the evidence. The provision under which that evidence was sought to be made admissible is now contained in section 4 of the Criminal Law Procedure Act, 1865, which re-enacted the Common Law Procedure Act, 1854. Before that it had probably been the common law that, quite apart from any statute, questions were admissible—certainly in the ordinary common law courts—whereby if a witness gave evidence of a fact that was relevant to the issue (and that is important, because if the question merely goes to credit, he cannot be contradicted) it could be put to him that on some earlier occasion he had made a contrary statement to somebody else and, if he denied it, that somebody else could be called. What was probably the common law was certainly made statutory by the Common Law Procedure Act, 1854, and then by Denman's Act, the Criminal Procedure Act, 1865, which is somewhat misnamed, because it applies not only to all courts of criminal judicature, but also to all other courts too. In our opinion, the learned Common Serjeant misread the section, because he thought it applied only to statements which had previously been made on oath or in depositions or in some form of writing. In this respect we think that he was wrong. The principle derives from the common law and has been applied to all courts, not only criminal courts, where one may be likely to find depositions.

Though the learned Common Serjeant was wrong in excluding this evidence, the case is, in our view, the clearest possible case for the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907. It is far from certain that the question of bottle or no bottle was in any way decisive. The jury may not have attached very much importance to it, but, assuming they did, then they had to make up their minds between the evidence of Cunliffe and that of Donovan. Cunliffe

1957
Dec. 18

RICHARD CHARLES HART

Goddard L.C.J.,
Devlin J.,
Pearson J.

said that there was no bottle; Donovan's evidence went to show that there was. If this conversation had been proved, they would still have had to make up their minds between Cunliffe and Donovan. Cunliffe denied the conversation; Donovan, presumably, would have deposed to it. In those circumstances, the evidence would have taken the matter no further at all. One must assume that, if they thought the bottle was important, it is because they preferred Cunliffe's evidence to Donovan's and they would have acted on it just in the same way if the issue had been raised whether or not there was a conversation.

There is nothing in the other points of appeal, and therefore the appeal must be dismissed.

Appeal dismissed.

Solicitors: Male & Wagland, Hayes, for the appellant; The Solicitor, Metropolitan Police, for the Crown.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DEVLIN
AND MR. JUSTICE PEARSON

HILL *v.* BAXTER

1957
Dec. 6 & 19

Dangerous Driving — Offence Involving Absolute Liability — Questions of Mens Rea and Intention Immaterial—When Person at Wheel Can be Said Not to be Driving—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 11.
Automatism—How Far a Defence to Crime—Burden of Proof.

The offence of dangerous driving is one which is absolutely prohibited. No question of *mens rea* enters into it, and intention is immaterial. In any ordinary case, once it has been proved that the defendant was in the driving seat of a moving car, there is prima facie an obvious and irresistible inference that he was driving it, but there may be cases where the circumstances are such that the defendant cannot really be said to be driving at all, *e.g.*, where he had a stroke or epileptic fit, or was stunned by a blow on the head from a stone, or was attacked by a swarm of bees. In the case of a driver who knows that he is liable to have an epileptic fit, there is a question of fact whether driving in such circumstances can properly be considered reckless or dangerous, and the answer might depend to some extent on the degree and frequency of the epilepsy and the degree of probability that an epileptic fit might come upon him.

There is no decided authority on the question how far and in what circumstances a defence of automatism can successfully be raised in this or any other offence, or (*per* Devlin and Pearson JJ.) where the burden of proof would lie if such a defence were to be raised. *Per* the Lord Chief Justice: If such a defence were to be raised, the burden of proof would lie on the defendant.

Case stated by Brighton justices.

At Brighton Magistrates' Court informations were preferred by the appellant, Thomas Richard Hill, a police officer, charging the respondent, Kenneth Baxter, with dangerous driving of a motor-vehicle, contrary to section 11 (1) of the Road Traffic Act, 1930, and with failing to conform to a "Halt" sign, contrary to section 49 (*b*) of the Act. The informations were heard together and the following facts were established. At 10.45 p.m. on April 12, 1957, the respondent drove a motor-van along Springfield Road, Brighton, in a westerly direction and, where that road crosses Beaconsfield Road, he ignored an illuminated "Halt" sign, drove across the road junction at a fast speed and came into collision with a car which was being driven northwards in Beaconsfield Road. The respondent's van then carried on for a short distance and overturned. A police constable arrived, found the respondent in a dazed condition and took him to hospital. At the hospital the respondent said: "I remember being in Preston Circus going to Withdean. I don't remember anything else until I was searching for my glasses. I don't know what happened." To be in Springfield Road on the way to Withdean from Preston

Circus involved a substantial and unnecessary detour, but the respondent must have exercised skill in driving in order to reach Springfield Road by whatever route he took.

The only evidence called for the defence was that of the respondent himself, which the justices accepted. They found that he remembered nothing from the time when he was at Preston Circus till the accident had happened, and that he was not conscious of what he was doing after leaving Preston Circus, " with the implication that he was not capable of forming any intention as to the manner of his driving." They accepted a submission that loss of memory could be attributed only to the respondent being overcome by sudden illness without warning, and dismissed the informations. The prosecutor appealed.

Anthony Harmsworth (*Duncan Ranking* with him) for the appellant. There was no evidence before the justices on which they could dismiss the informations. Their finding must be regarded as perverse.

John Alliott, for the respondent. The case of the respondent was analogous to that of a Rugby footballer who carried on playing after being rendered unconscious or of a horse-rider who remounted after being thrown and knocked senseless. The justices were entitled to come to the conclusion that the respondent, after losing consciousness, was driving only in the sense that he was behind the steering wheel and that his muscles were operating it. He was not driving in the full sense because his mind was not directing his actions. He was unconscious at the time and therefore not criminally liable. [DEVLIN J.: This is a new doctrine. You seem to have invented a new kind of *mens rea* for the occasion.] It is submitted that there was no *mens* at all after the respondent became unconscious. [THE LORD CHIEF JUSTICE: Dangerous driving is absolutely prohibited, and therefore absence of *mens rea* is no answer, or the doing of the act supplies the *mens rea*. If a man is driving dangerously, his intention does not matter.] The matter can be put only in this way: the respondent was not driving at the time. [DEVLIN J.: Your argument seems to me that his condition was equivalent to a state of sleep-walking. The only question is, whether automatism of that sort is an answer to a charge of this kind.] [PEARSON J.: If a man is unconscious in the full sense, he is not driving.] [THE LORD CHIEF JUSTICE: Any more than a man who dies at the wheel as he is driving.] The position of the respondent must be equated with that of a man who dies at the wheel.

THE LORD CHIEF JUSTICE said that, in view of the importance of the point to the criminal law, the court would take time to consider their judgment.

Cur. adv. vult.

Dec. 19. The following judgments were read.

THE LORD CHIEF JUSTICE: This Special Case Stated by justices for the County Borough of Brighton concerns two informations preferred against the respondent, the first for the dangerous driving of a motor-vehicle, contrary to section 11 (1) of the Road Traffic Act, 1930, and the second for failing to conform to a " Halt " sign, contrary to section 49 (*b*) of the Act. The facts found by the justices are that at 10.45 p.m. on the evening of April 12, 1957, the respondent drove a motor-van along Springfield Road, Brighton, in a westerly direction and, where that road crosses Beaconsfield Road, he ignored an illuminated " Halt " sign, drove across the road junction at a fast speed and came into collision with a car which was being driven northwards in Beaconsfield Road. The respondent's van then carried on for a short distance and overturned. A police constable arrived and found the respondent in a dazed condition, and at the hospital to which he was taken he said: " I remember being in Preston Circus going to Withdean. I don't remember anything else until I was searching for my glasses. I don't know what happened." The justices found that to be in Springfield Road on the way to Withdean from Preston Circus involved a substantial and unnecessary detour, but that the respondent must have exercised skill in driving in order to reach Springfield Road by whatever route he took. The justices apparently accepted the respondent's evidence and found that he remembered nothing from the time when he was at Preston Circus till the accident had happened. They were of opinion that the respondent was not conscious of what he was doing after leaving Preston Circus and to this finding they add the words " with the implication that he was not capable of forming any intention as to his manner of driving." They dismissed the informations, accepting a submission that loss of memory could only be attributed to the respondent being overcome by illness without warning.

There was no evidence for the defence other than that of the respondent himself, but it seems that, as the prosecution did not object, the justices allowed two letters from a doctor who had examined the respondent to be put in. This was quite irregular; agreed medical reports, so often used in civil actions, have no place in criminal courts. Evidence must be given on oath and be subject to cross-examination unless there is a statutory exception allowing documents or certificates to be put in as evidence, as for instance under section 41 of the Criminal Justice Act, 1948. The justices have referred to these letters in the case, so we have looked at them. They are certainly in no way favourable to the respondent; the consultant neurologist who examined the respondent could find no trace of illness or abnormality. He said in his first report he had had an E.E.G.—that is some form of encephalogram—done and was going to examine the respondent again when the report would be through in a fortnight's time. In his further report on May 2 the doctor says the report showed no abnormality and that from a medical point of view it is impossible to say whether he had " a black-out " or not. So there is no medical or scientific evidence of any illness at all.

The first thing to be remembered is that the statute contains an absolute prohibition against driving dangerously or ignoring " Halt " signs. No question of *mens rea* enters into the offence; it is no answer to a charge under those sections to say " I did not mean to drive dangerously " or " I did not notice the ' Halt ' sign." The justices' finding that the respondent was not capable of forming any intention as to the manner of driving is really immaterial. What they evidently mean is that the respondent was in a state of automatism. But he was driving and, as the case finds, exercising some skill, and undoubtedly the onus of proving that he was in a state of automatism must be on him. This is not only akin to a defence of insanity, but it is a rule of the law of evidence that the onus of proving a fact which must be exclusively within the knowledge of a party lies on him who asserts it. This no doubt is subject to the qualification that, where an onus is on the defendant in a criminal case, the burden is not as high as it is on a prosecutor. The main contention before us on the part of the appellant was that there was no evidence on which the justices could find that the respondent was in a state of automatism or whatever term may be applied to someone performing acts in a state of unconsciousness. There was in fact no evidence except that of the respondent, and, while the justices were entitled to believe him, his evidence shows nothing except that after the accident he cannot remember what took place after he left Preston Circus. This is quite consistent with being overcome with sleep or at least drowsiness. That drivers do fall asleep is not an uncommon cause of serious road accidents, and it would be impossible as well as disastrous to hold that falling asleep at the wheel was any defence to a charge of dangerous driving. If a driver finds that he is getting sleepy, he must stop. The justices no doubt were greatly influenced by the dictum, and it is only a dictum, of Humphreys J. in KAY *v.* BUTTERWORTH (1945) 110 J.P. 75. In that case the learned judge, after emphasising that drowsiness or sleep would be no excuse, said, " I do not mean to say that a person should be made liable at criminal law who, through no fault of his own, becomes unconscious while driving, as, for example, a person who has been struck by a stone or overcome by a sudden illness, or when the car has been put temporarily out of his control owing to his being attacked by a swarm of bees." I agree that there may be cases where the circumstances are such that the accused could not really be said to be driving at all. Suppose he had a stroke or an

1957
Dec. 6 & 19

Hill *v.* Baxter

Goddard L.C.J., Devlin J., Pearson J.

epileptic fit, both instances of what may properly be called Acts of God; he might well be in the driver's seat even with his hands on the wheel, but in such a state of unconsciousness that he could not be said to be driving. A blow from a stone or a swarm of bees I think introduces some conception akin to *novus actus interventens*. In this case, however, I am content to say that the evidence falls far short of what would justify a court holding that this man was in some automatous state. There was no evidence he was suffering from anything to account for what is so often called a " black-out " and which probably, if genuine, is epileptic in origin. Nor was there any evidence that he had ever had an attack of this description before. As I have said above, his own evidence, and that is all there was, is consistent with having fallen asleep, or having his mind full of other matters and not paying proper attention. It is obvious that, as such a defence is, in effect, saying that the accused did not know or appreciate the nature and quality of his actions, it is getting very near a defence of insanity. It may be that in homicide cases attention may have to be given to the matter where diminished responsibility is set up. In the present case I am content to rest my judgment on the ground that there was no evidence which justified the justices finding that the respondent was not fully responsible in law for his actions and that his intention was immaterial, as there was here an absolute prohibition. I would allow the appeal. I desire to say, in view of some discussion at the hearing, that this is certainly not a case of a perverse finding by justices, who obviously considered the case with great care and anxiety. The question asked by the justices is answered in the negative and the case must go back with a direction to convict. The penalty is a matter for the justices, but we have no doubt they will bear in mind the view of the neurologist as to the fitness of the respondent to drive.

DEVLIN J.: I agree that if the onus lies upon the defence to produce some evidence of automatism, they have failed to do so, with the result that the justices came to a wrong conclusion in law. I do not find it necessary, before deciding whether there is such an onus, to determine just what part automatism plays in liability for crime. It is a novel point that would require careful consideration; the answer would certainly depend, among other things, upon the nature of the liability which the prosecution had to establish.

I am satisfied that even in a case in which liability depended upon full proof of *mens rea,* it would not be open to the defence to rely upon automatism without providing some evidence of it. If it amounted to insanity in the legal sense, it is well established that the burden of proof would start with and remain throughout upon the defence. But there is also recognised in the criminal law a lighter burden which the accused discharges by producing some evidence, but which does not relieve the prosecution from having to prove in the end all the facts necessary to establish guilt. This principle has manifested itself in different forms; most of them relate to the accused's state of mind and put it upon him to give some evidence about it. Thus, the fact that an accused is found in possession of property recently stolen does not of itself prove that he knew of the stealing. Nevertheless, it is not open to the accused at the end of the prosecution's case to submit that he has no case to answer; he must offer some explanation to account for his possession, though he does not have to prove that the explanation is true: AVES (1950) 34 Cr.App.R. 159. In a charge of murder it is for the prosecution to prove that the killing was intentional and unprovoked and that burden is never shifted: WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 25 Cr.App.R. 72; [1935] A.C. 462. But though the prosecution must in the end prove lack of provocation, the obligation arises only if there is some evidence of provocation fit to go to the jury; HOLMES *v.* D. P. P., 31 Cr.App.R. 123; [1946] A.C. 588. The same rule applies in the case of self-defence. LOBELL, 41 Cr.App.R. 100; [1957] 3 W.L.R. 524. In any crime involving *mens rea* the prosecution must prove guilty intent, but if the defence suggests drunkenness as negativing intent, they must offer evidence of it, if indeed they do not have to prove it: D. P. P. *v.* BEARD, 14 Cr.App.R. 159, at p. 199; [1920] A.C. 479, at p. 507. It would be quite unreasonable to allow the defence to submit at the end of the prosecution's case that the Crown had not proved affirmatively and beyond a reasonable doubt that the accused was at the time of the crime sober, or not sleep-walking or not in a trance or black-out. I am satisfied that such matters ought not to be considered at all until the defence has produced at least prima facie evidence. I should wish to reserve for future consideration, when necessary, the question of where the burden ultimately lies.

As automatism is akin to insanity in law, there would be great practical advantage if the burden of proof was the same in both cases. But so far insanity is the only matter of defence in which under the common law the burden of proof has been held to be completely shifted.

In my judgment, there is not to be found in the Case Stated evidence of automatism of a character which would be fit to leave to a jury. It must be remembered that the justices were required to presume that the accused was not suffering from any disease of the mind, since he did not challenge the legal presumption of sanity. Although he was asserting that he did not know the nature and quality of his act, and so, inevitably, that he was suffering from a defect of reason or understanding, he was not saying that he was a victim of any disease of the mind. Unless there was evidence which showed that his irrationality was due to some cause other than disease of the mind, the justices were not entitled simply to acquit.

I agree that the conclusion which this court has reached does not mean that the justices have acted in any way perversely. We have been told that the chairman of the justices was a medical man and it may be that he felt able to draw inferences from the evidence which are not apparent to a layman. But judges of all kinds sit as laymen and not as experts, and verdicts of all kinds must be given according to the evidence. I do not doubt that there are genuine cases of automatism and the like, but I do not see how the layman can safely attempt without the help of some medical or scientific evidence to distinguish the genuine from the fraudulent.

I have drawn attention to the fact that the accused did not set up a defence of insanity. For the purposes of the criminal law there are two categories of mental irresponsibility, one where the disorder is due to disease and other where it is not. The distinction is not an arbitrary one. If disease is not the cause, if there is some temporary loss of consciousness arising accidentally, it is reasonable to hope that it will not be repeated and that it is safe to let an acquitted man go entirely free. But if disease is present, the same thing may happen again, and therefore since 1800 the law has provided that persons acquitted on this ground should be subject to restraint. The acquittal is now given in the illogical and disagreeable form of the verdict "Guilty but insane," and while it seems right that in such a case some conditions should be imposed, the only restraint known to the law is indefinite detention in what used to be called a criminal lunatic asylum. So it would be very surprising to find this defence raised in answer to charges under the Road Traffic Act. Whatever the theory of the law may be, mental disease is in practice not available as an excuse for the commission of any of the lesser crimes. I agree with the order proposed.

PEARSON J.: I agree with the judgment of the Lord Chief Justice, subject to the reservation and explanations which my Brother Devlin has made with regard to the burden of proof in a case such as this. The prosecution have to prove on the major charge in this case that the accused was driving dangerously. On the facts, if he was driving at all, he was unquestionably driving dangerously, and therefore the question at issue was and is whether he was driving the car. In any ordinary case, when once it has been proved that the accused was in the driving seat of a moving car, there is prima facie an obvious and irresistible inference that he was driving it. No dispute or doubt will arise on that point unless and until there is evidence tending to show that by some extraordinary mischance he was rendered unconscious or otherwise incapacitated from controlling the car. Take the following cases. (1) The man in the driving seat is having an epileptic fit, so that he is unconscious and there are merely spasmodic movements of his arms and legs. (2) By the onset of some disease he has been reduced to a state of coma and is completely unconscious. (3) He is stunned by a blow on the head from a stone which passing traffic has thrown up from the roadway. (4) He is attacked by a swarm of bees so that he is for the time being disabled and prevented from exercising any directional control over the vehicle, and any movements of his arms and legs are solely caused by the action of the bees. In each of these cases it can be said that at the material time he is not driving and therefore not driving dangerously. Then suppose that the man in the driving seat falls asleep. After he has fallen asleep he is no longer driving, but there was an earlier time at which he was falling asleep and therefore failing to perform the driver's elementary and essential duty of keeping himself awake and therefore he was driving dangerously. Similarly, in the case of a man who knows that he is liable to have an epileptic fit but nevertheless drives a vehicle on the road, there is a question of fact whether driving in these circumstances can properly be considered reckless or dangerous. The answer might depend to some extent on the degree and frequency of the epilepsy and the degree of probability that an epileptic fit might come upon him.

For the purpose of construing the word " drive " in section 11, one can have regard to the language of section 15 of the same Act. The opening words of that section before it was amended by the Road Traffic Act, 1956, were: " Any person who when driving or attempting to drive, or when in charge of, a motor-vehicle on a road or other public place is under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle, shall be liable," and so on. In this case there is a clear finding that the respondent was driving and driving with skill. It is said in the case: " (H) The respondent intended to go to Withdean from Preston

1957
Dec. 6 *&* 19

HILL *v.* BAXTER

Goddard L.C.J., Devlin J., Pearson J.

Circus, and he had made a substantial and unnecessary detour by driving into Springfield Road. (I) The respondent must have exercised skill in driving in order to reach Springfield Road from Preston Circus by whatever route he had taken." The importance of the finding that he was driving with skill is a necessary implication that he was controlling the car and directing its movements. Therefore, he was driving, and his driving was dangerous. The offence was committed and there is no evidence to support the acquittal. If in the material respect the burden of proof was on the prosecution, they discharged it by showing that the respondent was driving, and if the burden of proof was on the defence, they failed to prove an extraordinary mischance rendering it impossible for the respondent to control the car and direct its movements. I agree with the proposed Order.

Appeal allowed.

Solicitors: Sharpe, Pritchard & Co., agents for W. O. Todd, Town Clerk, Brighton, for the appellant; Jolly & Co., Brighton, for the respondent.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DEVLIN AND MR. JUSTICE PEARSON

1957
Dec. 19

FRANK ROBERT SWEETLAND
WINIFRED ELIZABETH MARGARET SWEETLAND

Verdict—Inconsistency—Questions by Judge to Jury.
Indictment—Count for Conspiracy to Commit Offences—Other Counts Charging Specific Offences.

There is no general rule that, whenever a verdict of Not Guilty on a count for conspiracy to commit offences and Guilty on other counts in the same indictment charging those specific offences is returned, or contrariwise when in such an indictment a verdict of Guilty of conspiracy and Not Guilty on the counts charging the specific offences is returned, the verdict is necessarily inconsistent. Each case must depend on its particular circumstances.

Where, however, in such a case the jury return a verdict which appears to be inconsistent, it is proper for the judge to put questions to the jury in an endeavour to clear up the apparent inconsistency, and it may be desirable that he should give the jury a further direction on the meaning and ingredients of conspiracy.

1957
Dec. 19

FRANK ROBERT SWEETLAND, WINIFRED ELIZABETH MARGARET SWEETLAND

Goddard L.C.J., Devlin J., Pearson J.

Appeals against conviction.

The appellants, Frank Robert Sweetland and his sister-in-law, Winifred Elizabeth Margaret Sweetland, were convicted at the Central Criminal Court on September 26, 1957, of causing cheques to be delivered by false pretences and were sentenced by the Recorder of London each to a fine of £100.

The indictment contained five counts. The first charged the appellants and persons named Beebe and Pope with on divers dates between May 15, 1955 and May 4, 1957 conspiring together with the husband of the female appellant and other persons to cheat and defraud Shell-Mex & B.P., Ltd. and divers customers of Shell-Mex & B.P., Ltd. of their goods and moneys by false pretences. The second charged all the defendants except Pope with causing a cheque for £40 to be delivered to Sweetland & Sons, Ltd. by Shell-Mex & B.P., Ltd. for the use or benefit or on account of Sweetland & Sons, Ltd. by false pretences. The third, fourth and fifth counts charged offences similar to that alleged in the second count in respect of different sums of money.

Beebe pleaded guilty to, and Pope was acquitted on, all counts in respect of which they were charged. Shell-Mex & B.P., Ltd. sent their oil products in steel drums, which were valuable, and Shell-Mex & B.P., Ltd. were prepared to pay £2 per drum for their return. Beebe evolved a scheme whereby a large quantity of these drums were collected from various places, and Beebe got them returned to Shell-Mex & B.P., Ltd. as though they came from Sweetland & Sons, Ltd.'s garage.

Shell-Mex & B.P., Ltd. would not have paid this money to the company if they had known that the drums returned were not drums which had been originally supplied by them to the company's garage.

The jury returned a verdict, as regards the two appellants, of Not Guilty of conspiracy, but Guilty on the four counts alleging the specific charges of causing cheques to be delivered by false pretences. Counsel for the appellants asked the Recorder for a certificate of appeal on the ground that the verdict was inconsistent. The Recorder then said to the foreman of the jury: "Perhaps, Mr. Foreman, you would just elaborate; do I gather that you find them guilty of participating in these charges without intending to do so?" (The Foreman) "We find that they did not initiate it." (The Recorder) "That is what you mean by that?" (The Foreman) "By conspiracy we find that they did not initiate it. They were perhaps unwittingly originally involved." (The Recorder) "It may be that your verdict is inconsistent. I want to give you the chance of explaining it. You found them guilty of being concerned in these charges together, but, when you say they did not conspire, did you mean they did not initiate it?" (The Foreman) "Yes, sir."

Edward Clarke, for the appellants. The verdict of the jury was inconsistent and should not be allowed to stand. The questions put by the Recorder to the foreman of the jury did not succeed in removing this inconsistency. In COOPER AND COMPTON (1947) 32 Cr.App.R. 102 the court drew attention to the inadvisability of framing indictments in the form adopted in the present case and the confusion that was likely to ensue.

J. H. Buzzard, for the Crown. It is conceded that an indictment in the form adopted in the present case is often undesirable, but here the prosecution deliberately decided that a general conspiracy count ought to be included because it was not easy to fix any particular transaction on any particular date on the appellants. The jury did not elucidate the matter in the way in which the Recorder had evidently hoped as a result of his questions to the foreman, but it cannot be said that the verdict at which they did arrive was an impossible one.

The Lord Chief Justice [after referring to the terms of the indictment and the facts as set out above:] Beebe, who pleaded guilty, was called as a witness for the prosecution and did his best to give evidence for the defence, or, at any rate, did give evidence that the appellants knew nothing about the fraud. Having read the cross-examination of the female appellant, I should find it very difficult to say that she did not know what was going on, at any rate for a good part of the time. I quite agree that there is considerably more to be said for the male appellant.

Mr. Buzzard for the prosecution has stated quite frankly that it was a deliberate policy in this case to charge conspiracy and to include other counts charging specific offences, although this court has more than once expressed the opinion that it is very often undesirable, if specific offences are going to be alleged, to charge conspiracy to commit those offences, because it sometimes confuses a jury. But Mr. Buzzard said that in this case this was done deliberately because it was not easy to fix any particular transaction on a particular date on to the two appellants. What was shown by the evidence was a course of conduct which really was consistent only with conspiracy, and it will be observed that the count charging conspiracy covered a period of two years and the specific offences which were alleged against the appellants jointly were all offences alleged to have been committed within that time.

The Recorder summed up the case quite shortly. He treated it as a reasonably simple and clear case, although the trial had taken three days. The jury returned a verdict that each of the appellants was Not Guilty of conspiracy, but Guilty on the counts alleging the specific offences. [After referring to the discussion between the Recorder, counsel and the foreman of the jury set out above, His Lordship continued:] The Recorder did not send the jury out to return any other verdict, and the verdict which was recorded was Not Guilty on the first count and Guilty on the second, third, fourth and fifth counts, all of which charged the appellants jointly. So there is a verdict which says on the face of it that over a period of two years the appellants were not conspiring to cheat and defraud Shell-Mex & B.P., Ltd. by false pretences, but that on certain specific occasions during that period they did defraud Shell-Mex & B.P., Ltd. by false pretences, and Mr. Clarke submits to this court that the verdict cannot stand because it is inconsistent.

This court is not laying down in this case, and has no intention of allowing this case to be quoted as an authority for saying, that, whenever a verdict of Not Guilty is returned on a count for conspiracy to commit offences and Guilty on other counts in the same indictment charging those specific offences, or contrariwise when a verdict of Guilty is returned on the count of conspiracy and Not Guilty on the counts charging specific offences, the verdict is necessarily inconsistent. Each case must depend on its particular circumstances, and it is very dangerous in circumstances of this sort to lay down general rules which could be quoted when the facts might be entirely different. In this case, however, we are faced with this difficulty. The initiator of the conspiracy was Beebe. He caused the drums to be sent back to Shell-Mex & B.P., Ltd. Shell-Mex & B.P., Ltd. would send credit notes for the amount of the drums and the female appellant and, to a lesser extent, the male appellant received payment for them and in some instances asked for it. There is very strong ground for suggesting that they, or at least the female appellant, could not help knowing, at any rate during part of the time, what was going on and that a fraud was being worked. At the same time it is only fair to say that Beebe did do his best in his evidence to say that the female appellant did not know what was going on, that she was only doing what she was told, and that she was deceived. Her case was that she was deceived either by her husband or by Beebe or by both.

I have already pointed out the dates that are material in this case and how difficult it is to see how the appellants could be acquitted of conspiracy and yet found guilty jointly of the specific offences. It was for that reason, no doubt, that when Mr. Clarke applied for a certificate of appeal, the Recorder put the questions which he did to the jury, and the Recorder was quite right to do so, but the answers of the jury were not entirely satisfactory. It looks as though they meant to say: "We think that at some time the defendants knew all about the fraud and were assisting Beebe to carry it out, although we do not think that they originated the fraud or agreed with Beebe at the first to carry it out." With all respect to the learned Recorder, the jury having returned a verdict of Guilty and then given this explanation, the only safe and proper course would have been for him to have given the jury a further direction on the matter and to have said: "Persons are just as guilty of conspiracy if they join in a conspiracy at a late date after the conspiracy has been in existence for some time as they are if they originate the conspiracy." Two persons may originate a conspiracy, we will say, in January. In the following March or June other persons may join the conspiracy and take part in it. Those persons who join in the conspiracy at a later date are just as guilty as the persons who started the conspiracy, because the agreement to do the illegal thing is itself the offence, whether the agreement is carried out or not, but no doubt there may be mitigating circumstances in the case of the persons who join later because they have not taken so great a part as the original conspirators.

The court is of opinion that it would be unsafe to speculate what the jury would have found if they had been told to go back and reconsider their verdict with the direction I have just given. They might have said: "If that is the fact, we shall not find the appellants guilty of causing cheques to be paid by false pretences." They might, and I think probably would, have said: "Now that you have explained the law, we shall find them guilty of conspiracy." But, as it is, there is a finding on the face of the indictment, which is the only record which can be looked at, of Not Guilty of conspiracy between May 15, 1955 and May 4, 1957 to defraud Shell-Mex & B.P., Ltd. of their goods by false pretences, and at the same time a finding

1957
Dec. 19

FRANK ROBERT SWEETLAND, WINIFRED ELIZABETH MARGARET SWEETLAND

Goddard L.C.J., Devlin J., Pearson J.

that the two appellants acting in concert did defraud them during that time on at least four occasions.

Another difficulty which, in our opinion, arises, although this point was not made a specific ground of appeal, is that all the fraudulent misrepresentations were made by Beebe. Of course, if the appellants were in conspiracy with Beebe, anything that Beebe did in the pursuance and furtherance of the conspiracy was as much the act of the appellants as it was an act of his own. Every act done by a conspirator in furtherance of the conspiracy is done on behalf of all the conspirators. But if there was no conspiracy, then what Beebe did was not being done on behalf of the appellants. It may be that this matter would have been cleared up if the Recorder had told the jury to consider their verdict further. As he did not do so, we think that Mr. Clarke is justified in saying that in this particular case there does appear to be on the face of it an inconsistency in the verdict. Persons are said to be guilty of acting together, which is of course conspiracy, in obtaining cheques by false pretences while at the same time they are said to be not guilty of conspiring to obtain them by false pretences.

With some reluctance and some hesitation the court has come to the conclusion that the only safe course in this case is to quash the convictions. We are doing so on the facts of this case and we are not laying down any particular rule with regard to verdicts which may appear inconsistent. It is only fair to the learned Recorder to say that perhaps he thought he had done quite enough in getting the explanation from the jury, especially as he was not intending to pass a sentence of imprisonment. He, no doubt, thought that a fine would end the matter, but it has not, and the defendants are entitled to take the points which they have taken. The convictions are quashed.

Convictions quashed.

Solicitors: Prothero & Prothero, for the defendants; The Solicitor, Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, Mr. JUSTICE HILBERY
AND Mr. JUSTICE SALMON

JOHN FRANCIS SPRIGGS

1958
Jan. 14

Murder—Diminished Responsibility—Summing-Up—Homicide Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 11), *s.* 2 (1).

Where the defence of diminished responsibility under section 2 (1) of the Homicide Act, 1957, is raised, the most satisfactory manner in which a judge can direct a jury on this issue is to call the attention of the jury to the exact terms of the subsection, to tell them that those are the tests which they have to apply, and to remind them of the evidence relating to the issue. The judge is under no obligation to attempt to re-define the statutory definition, nor is it desirable that he should do so.

Appeal against conviction.

The appellant was convicted at Birmingham Assizes on December 9, 1957, of capital murder and was sentenced by Jones J. to death.

At the time the appellant relied on the defence of diminished responsibility under section 2 (1) of the Homicide Act, 1957. The facts, in so far as they are material, appear fully from the judgment.

G. R. Swanwick, Q.C. (*C. H. Durman* with him), for the appellant. The ground of appeal is that the judge misdirected the jury on the meaning of " abnormality of mind " in section 2 (1) of the Act of 1957. The prosecution contended that this could not include various types of mental aberration from which the appellant had unquestionably suffered for a long time, and that the appellant could not be suffering from " abnormality of mind " by reason of the fact that he had a high intelligence quotient. The defence relied on medical evidence which showed that there was a lack of ability on the part of the appellant to control his emotions, and contended that conditions of that

1958
Jan. 14

JOHN
FRANCIS
SPRIGGS

Goddard
L.C.J.,
Hilbery J.,
Salmon J.

kind did come within the ambit of the subsection. In the face of these rival contentions it was incumbent on the judge to give the jury some further guidance than the mere reading of the subsection. They should have been told that the function of the mind was not limited to intelligence, but included also emotion, and that the question was one of degree. [THE LORD CHIEF JUSTICE: The doctrine of diminished responsibility has been borrowed from the law of Scotland, and their Lordships of the Justiciary have always found it difficult to explain to a jury.] If Parliament had intended to equate " abnormality of mind " with defect of reason, they would have used the latter phrase, as was done in the M'Naughten Rules. The accepted view of modern thought is that the seat of the control of the emotions is in the mind.

R. K. Brown, for the Crown, was not called on to argue.

THE LORD CHIEF JUSTICE: The appellant was convicted before Jones J. at the last Birmingham Assizes of capital murder and sentenced to death.

The circumstances relating to the case were that the appellant, who certainly had a history showing that he was of a somewhat unstable character, on the particular day went to a public house and was turned out by the barman because he was interfering with some of the barrels and fittings. Later, he came back after closing time, knocked at the door, and when the barman who had turned him out opened the door to him he drew a revolver and shot him. Then, when the barman lay on the ground, the appellant fired two further bullets into him. He ran away and was found suffering from an overdose of some barbiturate he had taken, but when he recovered from the effects of this overdose he said to police officers who were watching him in hospital: " It was the way he shoved me about. I was mad. I collected my gun and let him have it." He knew quite well what he had done and he gave the reason why he had done it.

The defence that was put forward on his behalf was that he was suffering from diminished responsibility within the meaning of section 2 (1) of the Homicide Act, 1957. The grounds of appeal put forward in this case are that the learned judge did not give a sufficient direction as to the meaning of the expression " abnormality of mind " or " mental responsibility " and did not distinguish to the jury between emotional instability or gross personality disorder, and so forth.

The subsection is in these terms: " Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing." The course which the learned judge took in summing up was this: There were prepared and handed to the jury the terms of the section so that they could see it, and the learned judge told the jury it was for them to decide whether or not the appellant suffered from such an abnormality of mind as substantially to impair his mental responsibility. To enable them to come to that decision the learned judge went meticulously and carefully through the evidence given on one side and the other. Let me say at once that he was quite right, and no one suggests otherwise, to leave the issue to the jury because there was evidence which, if the jury had taken that view, might have justified them in finding that this was a case of diminished responsibility and in finding in favour of the prisoner on that issue. But the evidence was not such as to compel the jury to find that way; there was evidence on the other side and, speaking for myself and, I think, for the other members of the court, I cannot see that a judge when dealing with this matter can do more than call the attention of the jury to the exact terms of the section which Parliament has enacted and leave them to say whether upon the evidence they are satisfied that the case comes within the section or not. When Parliament has given a definition, as they have with regard to what is to amount to diminished responsibility, it is not for judges to re-define or to attempt to define the definition.

The definition has been laid down by Parliament and it is a question of fact for the jury in any particular case to find whether the evidence brings the prisoner within the definition or whether it does not.

This conception of diminished responsibility is a novelty in English law. It is borrowed from the Scottish law where it has apparently always been part of the common law. I see I was reported yesterday as having said, and no doubt I did say, that the Lords of Justiciary in Scotland had always had difficulty in explaining this matter to a jury. What I meant was that the Scottish judges have always found that it is a difficult matter to explain to the jury and a difficult matter for the jury to understand exactly what " diminished responsibility " means. I had in mind the case of H.M. Advocate *v.* Braithwaite, 1945 S.C.(J.) 55, and I think it is worth while reading the charge that was given to the jury by Lord Cooper, Lord Justice-Clerk. He said (at p. 57) with regard to diminished responsibility: " Now, I have got to give you the most accurate instruction I can on this delicate question. The Solicitor-General read to you a passage from the charge of the Lord Justice-Clerk in the case of H.M. Advocate *v.* Savage, 1923 S.C.(J.) 49, at p. 51, and I am going to read a sentence or two again, because it seems to me to give as explicit and clear a statement of the sort of thing which you have to look for as I can find. He says: ' It is very difficult to put it in a phrase ' —and I respectfully agree—' but it has been put in this way; that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility—in other words, the prisoner in question must be only partially accountable for his actions.' And then he adds: ' And I think one can see running through the cases that there is implied . . . that there must be some form of mental disease.' The matter has been put in different words by other judges. I notice in a later case [Muir *v.* H.M. Advocate, 1933 S.C.(J.) 46, at p. 49] that the condition was referred to for short as 'partial insanity'; and that this was explained as meaning 'that weakness of great peculiarity of mind which the law has recognised as possibly differentiating a case of murder from one of culpable homicide.' And finally, to give you one last test, the question as put by the late Lord Clyde in the same case, quoting from a charge to a jury by Lord Moncrieff, was stated thus (at p. 48): 'Was he, owing to his mental state, of such inferior responsibility that his act should have attributed to it the quality not of murder but of culpable homicide?' You will see, ladies and gentlemen, the stress that has been laid in all these formulations upon weakness of intellect, aberration of mind, mental unsoundness, partial insanity, great peculiarity of mind, and the like. I am emphasising that just now because I shall have to revert to it when I come to say a word about the evidence we have heard today from Dr. Harrowes; but meantime, with those passages in your mind, I can only say to you that this is the sort of thing you have got to look for in the evidence led in support of this defence. If you can find enough to justify such a conclusion, your verdict should be one of culpable homicide only. If, on the other hand, you cannot find enough in the evidence to justify such a conclusion, then I have to tell you that, so far as this issue is concerned, you must steel yourselves to do your sworn duty by returning a verdict of guilty of murder."

It will be seen there that the Lord Justice-Clerk is not going into nice distinctions between mind and emotion or intellect and emotion, and one has to remember after all that juries are not drawn from University professors or University dons. They are ordinary men and women, and would not it only confuse them if one went into metaphysical and philosophical distinctions between what is emotion and what is intellect and matters of that sort? The fact is that this section is borrowed from the Scottish law and the Scottish law, as the learned Lord Justice-Clerk points out, recognises that a man may be not quite mad but a borderline case, and that is the sort of thing which amounts to diminished responsibility. If a

1958
Jan. 14

JOHN FRANCIS SPRIGGS

Goddard L.C.J., Hilbery J., Salmon J.

man sets up a defence of insanity, it has always been for the jury to find whether or not he is suffering from a disease of the mind. There is in the case of insanity no test which can be laid down other than the test in the M'Naughten Rules, but first of all it has to be found that there is a disease of the mind. That can be done only by the jury listening to the medical evidence and the facts of the case and coming to a conclusion whether what the prisoner did was the act of a sane man or insane man. So in the case of diminished responsibility it seems to the court that all one can do is to read the section to the jury and say: " That is what Parliament has said will amount to diminished responsibility and justify a verdict of manslaughter and not a verdict of murder." I do not know of any better way of instructing the jury on this very difficult point than by saying: " That is what Parliament has said. Those are the tests you have to apply. You are to consider whether he has abnormality of mind "—and how you are to define that I do not know, because it is very difficult to say what is a normal person or where the norm is—" whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury. If you can find any of those matters in the evidence, then you will find a verdict of manslaughter and not a verdict of murder." After all, in English law we are all very accustomed to the expression: " What would be the act of a reasonable man? " Has anyone ever attempted to define what is a reasonable man? I do not know of any definition of what is a reasonable man. A jury have to decide for themselves whether the action in question is the action of what they would call a reasonable man. So here, I think the matter was entirely one for the jury. I think that the learned judge put the case to the jury in the only way in which it can be put and that it is not the duty of the judge to enter into metaphysical distinctions such as Mr. Swanwick in his very attractive address to us on behalf of the appellant sought to persuade us came within the duty of the judge. For the reasons I have endeavoured to give this appeal fails and is dismissed.

Appeal dismissed.

[CENTRAL CRIMINAL COURT CASE]

BEFORE

Mr. JUSTICE DONOVAN

R. *v.* BASTIAN

1958
Jan. 29

Murder—Diminished Responsibility—Insanity not Alleged by Defence—Right of Prosecution to Adduce Evidence of Insanity—Burden of Proof—Homicide Act, 1957 (5 & 6 *Eliz.* 2, *c.* 11), *s.* 2.

Where the defence put in issue the state of the prisoner's mind by raising a defence of diminished responsibility, the prosecution are entitled, with a view to establishing insanity, to cross-examine witnesses called for the defence, to adduce evidence that the prisoner was insane at the material time, and to invite the jury to return a verdict of Guilty but insane.

Semble, in such a case the onus would rest on the prosecution to establish that the state of the prisoner's mind went beyond diminished responsibility and amounted to insanity.

Trial at the Central Criminal Court before Donovan J. and a jury.

The prisoner was charged on an indictment containing two counts, the first of which alleged that on December 18, 1957, he murdered his son Stephen Bastian, and the second of which alleged that he murdered his son Francis Bastian on the same date. When arraigned, the prisoner pleaded Guilty to both counts, but after discussion between the judge and counsel, the plea was withdrawn and a plea of Not Guilty entered on each count.

At the close of the case for the prosecution counsel for the defence said that he had no instructions from the prisoner to raise the issue of insanity, but that he proposed to call medical evidence with a view to establishing diminished responsibility. Counsel for the Crown intimated that, subject to the ruling of the judge, he proposed to cross-examine the witnesses called by the defence on the question whether the prisoner's mental state did not go beyond diminished responsibility and amount to insanity and to call in rebuttal the prison doctor, who would give evidence to that effect.

Christmas Humphreys and *J. M. G. Griffith-Jones* for the Crown.

F. H. Lawton. Q.C. and *R. H. K. Frisby* for the prisoner.

DONOVAN J. ruled that, the defence having put in issue the state of the prisoner's mind by raising a defence of diminished responsibility, the court could not stop the prosecution from cross-examining witnesses called for the defence and calling evidence in rebuttal with a view to establishing insanity, and inviting the jury to return a verdict of Guilty but insane.

Medical witnesses were then called by the defence with a view to establishing diminished responsibility and were cross-examined by counsel for the Crown, and the Crown called in rebuttal the prison doctor. Defending counsel asked for a verdict of manslaughter on the ground of diminished responsibility and counsel for the Crown for a verdict of Guilty but insane.

DONOVAN J. directed the jury that, there being no dispute that the prisoner killed his children, the issue to be decided, therefore, was whether he was insane at the time when he committed the acts, in which case the proper verdict would be Guilty but insane, or whether his mind was so affected by some abnormality that his responsibility was diminished, in which case the proper verdict would be Guilty of manslaughter.

The jury returned a verdict of Guilty of manslaughter on both counts and the prisoner was sentenced to imprisonment for life.

1958
Jan. 29

R. *v.*
BASTIAN

Donovan J.

After the jury had returned their verdict, DONOVAN J. said that it had occurred to him after the summing-up that in any similar case where a defence of diminished responsibility was raised whereupon the prosecution contended that the prisoner's state of mind amounted to insanity, it would be proper to direct the jury that it was for the prosecution to prove insanity.

Solicitor: W. Timothy Donovan, for the prisoner.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY
MR. JUSTICE CASSELS, MR. JUSTICE BARRY
AND MR. JUSTICE SALMON

NOEL GREEN

1958
Feb. 3

Sentence—Breach of Probation—Offence During Period of Probation—Illegal Sentence—Offender Released but Conviction not Quashed—Sentence Passed for Original Offence—Appeal—Power of Court to Inquire into Breach of Probation—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4 (3)—*Criminal Justice Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *ss.* 6, 8.

The appellant was convicted at quarter sessions and placed on probation. During the period of probation he was convicted by a magistrates' court of a further offence and sentenced to two months in a detention centre. As the minimum period of such detention that can lawfully be imposed is three months, the Home Secretary directed the release of the appellant, but the conviction at the magistrates' court was not quashed. The appellant was brought back to quarter sessions for sentence for the original offence. Quarter sessions decided that the appellant had not been " convicted and dealt with in respect of an offence committed during the probation period " within the meaning of s. 8 (5) of the Criminal Justice Act, 1948, but that by admitting the offence during the period of probation he had admitted a breach of the probation order, and, purporting to act under s. 6 (4) (*b*) of the Act, sentenced the appellant to Borstal training.

1958
Feb. 3

NOEL GREEN

Goddard L.C.J., Hilbery J., Cassels J., Barry J., Salmon J.

Held, that despite the language of s. 4 (3) of the Criminal Appeal Act, 1907, the Court of Criminal Appeal was not limited to considering the quantum of the sentence, but could and should consider the question whether the breach of probation had been properly proved; that s. 6 of the Act of 1948, which deals with breaches of probation other than those arising from the commission of a subsequent offence, had no application in the present case; and that as the sentence passed by the magistrates could not be upheld and as the appellant could have obtained from the Divisional Court an order of *certiorari* quashing the conviction in the magistrates' court, the court could not allow the sentence of quarter sessions to stand as a sentence passed following on a breach of probation, and must quash it.

SMITH, 18 Cr.App.R. 170; [1925] 1 K.B. 603 followed.

Appeal against sentence.

On January 28, 1957, the appellant pleaded Guilty at Buckinghamshire Quarter Sessions to shopbreaking and larceny and office-breaking and larceny and was placed on probation for two years. On October 14, 1957, having pleaded Guilty at Aldershot Magistrates' Court to larceny of a bicycle, he was sentenced to two months in a detention centre. Under section 18 of the Criminal Justice Act, 1948, the minimum period of such detention which can lawfully be imposed is three months. The Home Secretary directed the release of the appellant, but the conviction at the magistrates' court was not quashed. On November 11, 1957, the appellant appeared at Buckinghamshire Quarter Sessions for sentence for the original offence and was sentenced by the Chairman (Lord Birkett of Ulverston) to Borstal training.

J. Malcolm Milne, for the Crown. The appeal is one against sentence only and not against conviction. Under section 4 (3) of the Criminal Appeal Act, 1907, the court has power only to consider the quantum of the sentence and cannot consider whether the appellant was in breach of the terms of his probation. It must be conceded that there are a number of authorities where the contrary view was taken. The matter was regarded as doubtful in CALLAGHAN (1913) 8 Cr.App.R. 185. In SMITH, 18 Cr.App.R. 170; [1925] 1 K.B. 603 it was decided that the court had power to inquire into the circumstances of the breach of probation, but the point was not taken on behalf of the Crown that there was no such power and there was no reference to section 4 (3) of the Act of 1907 in the judgment. PINE (1932) 24 Cr.App.R. 10 appears to have proceeded on the basis that the finding that there was a breach of recognisance amounted to a conviction; but in DAVID (1939) 27 Cr.App.R. 50, at p. 51 it was made clear that this was not so. In that case the court laid down that, though the appeal which lies in circumstances similar to those of the present case is an appeal against sentence, the court will investigate the question whether the breach of recognisance has been properly proved. The court, therefore, has over a long period acted as if it had power in such circumstances to inquire into an alleged breach of probation or recognisances. The appellant here claims that he was not legally before Buckinghamshire Quarter Sessions on November 11, 1957. The Chairman decided that the appellant had not been " convicted and dealt with " in respect of the offence of larceny of the cycle within the meaning of section 8 (5) of the Criminal Justice Act, 1948, but that by admitting that he had stolen it the appellant had admitted a breach of the probation order, and the Chairman proceeded to sentence him under section 6 (4) (*b*) of the Act. The appellant will doubtless contend that certain preliminary procedure laid down in other subsections of section 6 had never been carried out and that the Chairman had no power to deal with him under section 6 (4) (*b*).

[THE LORD CHIEF JUSTICE : If the appellant had applied for an order of *certiorari*, his conviction at the magistrates' court would have been quashed, because it would have been bad on the face of the record.] Yes, and it is submitted that *mandamus* would have lain at the instance of the prosecution to compel the magistrates to pass a sentence authorised in law.

Denis Henry, for the appellant. It is conceded that the appeal is one against sentence, but it is submitted that on the authorities the court is entitled to consider whether the

1958
Feb. 3

NOEL GREEN

Goddard L.C.J., Hilbery J., Cassels J., Barry J., Salmon J.

alleged breach of probation was properly proved. Where a breach of probation other than a conviction of another offence was being relied on, the Chairman had power to deal with the appellant under section 6 (4) (*b*) only after a summons or warrant had been issued by magistrates under section 6 (1) and it had been proved under section 6 (3) to the satisfaction of the magistrates' court that the appellant had failed to comply with a requirement of the probation order. None of this was done and therefore Quarter Sessions had no power to deal with the appellant under section 6 (4) (*b*). This court can, in such circumstances, quash the sentence without passing any other sentence, ETTRIDGE, 2 Cr.App.R. 62; [1909] 2 K.B. 24.

THE LORD CHIEF JUSTICE: This is an appeal against sentence brought by a young man who has been sentenced to Borstal training by the Quarter Sessions for the county of Buckingham.

The circumstances are wholly unusual and are not likely, often at any rate, to occur again. What happened was this: The appellant was originally convicted of shopbreaking and larceny and office-breaking and larceny before the Quarter Sessions at Aylesbury and was placed on probation. While he was on probation he committed another offence of stealing a bicycle, for which he was brought before a magistrates' court at Aldershot. The magistrates' court thinking, I suppose, that they did not want to be too hard on him, and thinking that a detention centre was the place to which to send him, sent him to a detention centre for two months. But unfortunately a court cannot send a person to a detention centre for less than three months. I suppose Parliament thought and, if one may say so, one can well understand it, that if a youth is to get any real advantage from detention in a detention centre three months is the least time for which he should be sent there. When this matter was brought to the attention of the Home Office, the Home Secretary came to the conclusion that it was his duty to order the appellant to be released, because he took the view that he was being held

1958
Feb. 3

NOEL GREEN

Goddard L.C.J.,
Hilbery J.,
Cassels J.,
Barry J.,
Salmon J.

under an illegal sentence. This is the only case, I should think, in which it could ever occur that a person could appeal or obtain his release because he had been sentenced to too short a sentence; the complaint in this court is generally that the sentence is too long. The Home Secretary did not purport to quash the conviction because he has no power to do so; he can only act under the Prerogative, and the conviction never has been quashed. Thereupon, the appellant was again brought before the Quarter Sessions at Aylesbury, and the court had considerable difficulty in knowing how to deal with him because of the fact that the sentence which had been passed for stealing the bicycle was an illegal sentence in the way I have explained. The court came to the conclusion that they would deal with him under section 6 of the Criminal Justice Act, 1948. That is a section which enables the court to deal with a breach of conditions which may be imposed on a person who is put on probation. Very often one of the terms of the probation order is that the probationer shall live at a certain place or shall live where directed by the probation officer. Sometimes a condition is imposed that he shall not live at a certain place, and there are various other terms which the court can impose and, of course, there is always the condition that the probationer shall keep the peace. Sometimes there is a condition inserted that he shall lead an industrious life, so that if he is offered work and will not take it, he may be brought before the court for breach of probation. Apparently section 6 of the Act is meant to deal only with breaches of that description, because the concluding words of subsection (6) of that section are " and without prejudice to the provisions of section 8 of this Act, a probationer who is convicted of an offence committed during the probation period shall not on that account be liable to be dealt with under this section for failing to comply with a requirement of the probation order "; so, for the purposes of section 6, a further offence is, so to speak, excluded.

Mr. Henry has quite rightly called attention to the fact that there is a certain procedure laid down before the court can deal

1958
Feb. 3

NOEL GREEN

Goddard
L.C.J.,
Hilbery J.,
Cassels J.,
Barry J.,
Salmon J.

with a probationer under section 6. By subsection (2) he has to be brought before a court of summary jurisdiction. Then, by subsection (3) (*a*) if the probation order was made by a court of assize or quarter sessions, he has to be committed in custody or released on bail until he can be brought or appear before the court of assize or quarter sessions. Then by subsection (4) (*b*) when he is brought before the court of assize or quarter sessions " and it is proved to the satisfaction of that court that he has failed to comply with any of the requirements of the probation order, that court may deal with him, for the offence in respect of which the probation order was made, in any manner in which the court could deal with him if he had just been convicted before that court of that offence."

Before I refer to section 8, the first point we have to deal with is this: Mr. Milne has addressed an interesting argument to the court on the question whether there is any right to appeal here at all because, he says, there has been no conviction against which an appeal will lie, and when one is dealing with an appeal against sentence, the only possible appeal would be against the quantum of sentence. But it appears from the cases which Mr. Milne has most properly brought to our attention that from a very early period of the history of this court the court has always dealt with the question whether a person brought before a court because of a breach of recognisance has a right of appeal, and has always granted a right of appeal. There was one case, CALLAGHAN (1913) 8 Cr.App.R. 185, in which the court doubted the existence of the right, but the doubt was afterwards set at rest in SMITH, 18 Cr.App.R. 170; [1925] 1 K.B. 603. Since that case this court must be taken to have decided that it always has power to deal with the question of the breach of probation or recognisance where a sentence has been passed on a person who has been brought before a court under the terms of a probation order or a common law recognisance and has been sentenced for the original offence. We think, therefore, that we should not be following the cases

1958
Feb. 3

NOEL GREEN

Goddard L.C.J., Hilbery J., Cassels J., Barry J., Salmon J.

which have been decided if we held that there was no such right of appeal.

Then what are we to do? We have said that section 6 of the Act of 1948, under which quarter sessions purported to act in this case, does not, in our opinion, apply. We do not think the attention of quarter sessions could have been called to the concluding words of subsection (6). Quarter sessions did consider section 8, and the difficulty which they felt with regard to section 8 is a very real difficulty. It is the difficulty of using a conviction, which is recognised to be bad so far as the sentence passed on that conviction is concerned, to establish a ground for saying that a person has committed a breach of recognisance. The matter is put quite shortly, as a matter of fact, in the appellant's notice of appeal when he says: "In September, 1957, I was charged with the stealing of a cycle and sent to a detention centre for two months by the Aldershot magistrates. It was later found that the minimum sentence was three months and the offence was squashed [*sic*], and I was discharged after serving only eight days. If this offence was squashed [*sic*], I fail to see how I could be charged with breach of probation for which I have received Borstal training." In other words he is saying: "The conviction for which I was brought before the Court of Quarter Sessions cannot be used to say I had committed a breach of probation." As I have said, the conviction in fact never was quashed, but it is quite clear that if the appellant could have been advised at the time, he would have been advised to apply for an order of *certiorari* to bring up the conviction before the Aldershot Magistrates to the Divisional Court and get it quashed, and quashed it would have been. I think it is an unfortunate hiatus in our law, and one to which the Queen's Bench Division has on more than one occasion called attention, that where a conviction by magistrates is brought before the Divisional Court on the ground that the magistrates *per incuriam* have passed a sentence which is not justified by law, unfortunately the Divisional Court has no

1958
Feb. 3

NOEL GREEN

Goddard
L.C.J.,
Hilbery J.,
Cassels J.,
Barry J.,
Salmon J.

power to amend. They can only look at the conviction, and the conviction is bad on its face, and therefore has to be set aside. It is quite absurd, because if a man appeals against his sentence to quarter sessions, quarter sessions can put the matter right. If a man is convicted on indictment and an illegal sentence is passed, this court can put it right. It is only where a sentence is passed by magistrates and is challenged by means of *certiorari* that the Divisional Court has no power to put it right, and I hope at no great distance of time a provision will be made in the law, though it must be made by an Act of Parliament, to give the Divisional Court power to alter an illegal sentence which has been passed to a legal sentence, because otherwise the convicted person goes unpunished.

The one matter which has given us trouble in this case is that subsection (5) of section 8 provides: " Where it is proved to the satisfaction of the court by which a probation order or an order of conditional discharge was made, or, if the order (being a probation order) was made by a court of summary jurisdiction, to the satisfaction of that court or the supervising court, that the person in whose case that order was made has been convicted and dealt with in respect of an offence committed during the probation period, or during the period of conditional discharge, as the case may be, the court may deal with him, for the offence for which the order was made, in any manner in which the court could deal with him if he had just been convicted by or before that court of that offence." Those words " convicted and dealt with " cause some difficulty. It may be that, on their true construction, they simply mean that the magistrates have made some order, so that they are *functi officio*; or it may be said that they mean convicted and sentenced, and therefore dealt with. The court does not propose in this case to resolve that difficulty, and really it is more or less academic. What we do feel is that, as the sentence that was passed upon the appellant by the magistrates at Aldershot could not be upheld because it was one of two months instead of one of three months, and as for that reason the Home

1958
Feb. 3

NOEL GREEN

Goddard L.C.J., Hilbery J., Cassels J., Barry J., Salmon J.

Secretary felt obliged to discharge him from custody, and as if the conviction had been brought before the Divisional Court by *certiorari* they would have quashed it, on the whole we ought not to allow the sentence of Borstal training to stand as a sentence passed following on a breach of probation. If it had been brought before the Queen's Bench Division, the conviction would have had to be quashed, and of course if the conviction was quashed then, as the appellant argues in his notice of appeal, it could not have been used to support a breach of probation or recognisance. The position is unsatisfactory, it is wholly technical and there are no merits in the appeal at all, as Mr. Henry, who appeared for the appellant and has quite properly taken every point, has admitted, but the criminal law still allows technical points to be taken and, if the technical point succeeds, the convicted person goes unpunished. In this case it may be unfortunate that a youth who is obviously in need of discipline and training will have to be discharged, but this court cannot see any way in which this sentence can properly be upheld. The appeal is therefore allowed and the appellant will be discharged.

Sentence quashed.

Solicitors: N. M. Fowler, Town Clerk, High Wycombe, for the Crown.

BEFORE

MR. JUSTICE CASSELS, MR. JUSTICE STREATFEILD AND MR. JUSTICE SLADE

AMEDEO VACCARI

1958
Feb. 10

Bankruptcy—Contributing to Insolvency by Gambling—Debt "Contracted in the Course and for the Purposes of . . . Trade or Business"—Debt to Inland Revenue not Included—Bankruptcy Act, 1914 (*4 & 5 Geo. 5, c.* 59), *s.* 157 (1).

By s. 157 (1) of the Bankruptcy Act, 1914: " Any person who has been adjudged bankrupt . . . shall be guilty of a misdemeanour, if, having been engaged in any trade or business, and having outstanding at the date of the receiving order any debts contracted in the course and for the purposes of such trade or business,—(*a*) he has, within two years prior to the presentation of the bankruptcy petition, materially contributed to or increased the extent of his insolvency by gambling . . . unconnected with his trade or business; or (*b*) he has, between the date of the presentation of the petition and the date of the receiving order, lost any part of his estate by such gambling . . . as aforesaid. . . ."

Income tax on business profits is the Crown's share of such profits, and unpaid income tax, being not a trade debt but a statutory liability, cannot be a debt " contracted in the course and for the purposes of [a] trade or business " within the meaning of the above subsection.

Appeal against conviction and sentence.

The appellant was convicted at the County of London Sessions on December 11, 1957, of two offences under section 157 (1) of the Bankruptcy Act, 1914, in respect of each of which he was sentenced by the Deputy-Chairman to a term of six months' imprisonment and also of failing to keep proper books, contrary to section 158 of the Act, in respect of which he was sentenced to three months' imprisonment. All the sentences were ordered to run concurrently. There was no appeal against either conviction or sentence in respect of the offence of failing to keep proper books. The first count charged the appellant that, being adjudged a bankrupt, he materially contributed to or increased his insolvency by gambling within two years prior to the presentation of the bankruptcy petition, contrary to section 157 (1) (*a*) of the Act, and the second count charged him, being adjudged a bankrupt, with having lost part of his estate by gambling between the date of the presentation of the bankruptcy petition and the date of the receiving order, contrary to section 157 (1) (*b*).

The appellant was engaged in business as a café proprietor from which he made a large annual profit. In 1950 the Inland Revenue served on him a reassessment of tax for the years 1944–49 amounting to £5,000, and on October 7, 1955, a further assessment in the sum of £2,000. The appellant failed to pay, and on January 3, 1956, the Board secured a judgment for £5,166 against him for the reassessment in 1950. The appellant was unable to satisfy the judgment and on July 27, 1956, the Board presented a bankruptcy petition against him. On November 22, 1956, a receiving order was made, and in January, 1957, the appellant's public examination in bankruptcy was held. The appellant there gave evidence that in the two years prior to the presentation of the petition he had lost about £3,000 by gambling and in the period between the presentation of the petition and the making of the receiving order a further £2,000.

The Deputy-Chairman granted a certificate under section 3 (*b*) of the Criminal Appeal Act, 1907, on the question whether he was correct in law in directing the jury that the debt to the Inland Revenue was a debt " contracted in the course and for the purposes of [the appellant's] trade or business " within the meaning of section 157 (1) of the Bankruptcy Act, 1914.

Victor Durand, for the appellant. The Deputy-Chairman was wrong in holding that unpaid income tax did fall within the words " debts contracted in the course and for the purposes of . . . trade or business " in section 157 (1) of the Act of 1914. Income tax is not a trade debt, but a liability to the Crown for share of profits of trade or business. This is illustrated by various decisions in regard to income tax. In STRONG & CO., LTD. *v.* WOODIFIELD (Surveyor of Taxes) [1906] A.C. 448 it was held that a trader cannot deduct from his profits the cost of having to pay damages for injury caused to other persons by a faulty structure on his business premises. In SMITH'S POTATO ESTATES, LTD. *v.* BOLLAND (Inspector of Taxes) [1948] 2 All E.R. 367 it was held that the costs of bringing an action against the Board of Inland Revenue on a matter concerned with income tax cannot be deducted from profits liable to tax. Again, ALLEN *v.* FARQUHARSON BROS. & CO. (1932) 17 Tax.Cas. 59 established the proposition that the costs of unsuccessfully defending an action brought by the Board cannot be deducted.

S. A. Morton and *C. P. C. Whelon*, for the Crown, did not seek to support the convictions on counts 1 and 2.

CASSELS J.: By the certificate of the learned Deputy-Chairman, before whom this appellant was convicted, this case comes to this court and raises a question probably of some importance.

The appellant was convicted upon three counts under the Bankruptcy Act, 1914. Two of them under section 157 (1) alleged, respectively, that during a certain period before the presentation of his bankruptcy petition and during the period between the date of the presentation of the petition and the receiving order he had materially contributed to or increased the extent of his insolvency by gambling. The third alleged that contrary to another section of the Act, section 158, he did not keep proper books. The certificate for appeal which enables him to come to this court entitles him to have his case heard upon the convictions upon the first two counts. Put very shortly, the position is this: He was a trader who ran a café. He was very successful with regard to the café business, and made a large sum of money yearly by way of profit in that trade or business. He was also very unsuccessful in another line of country, namely, gambling, and the result was that he paid his gambling debts, but omitted to pay his debts due to the Inland Revenue. In due course of time he had incurred such an amount of indebtedness to the Inland Revenue that they reassessed him for a sum of £5,000, and succeeded in getting judgment against him for the sum of £5,166, to which they added another assessment for another period of £2,000, so that, when he was adjudicated bankrupt, he was in the position of owing money in the course of his trade or business to a certain number of creditors and also of owing to the Inland Revenue a sum of £7,000. There was evidence for the consideration of the jury that he had gambled, and as the result of gambling during the material period had brought himself within the mischief of section 157 (1) of the Bankruptcy

Act of 1914, the words of which are of some importance: "Any person who has been adjudged bankrupt, or in respect of whose estate a receiving order has been made, shall be guilty of a misdemeanour, if, having been engaged in any trade or business, and having outstanding at the date of the receiving order any debts contracted in the course and for the purposes of such trade or business,—(*a*) he has, within two years prior to the presentation of the bankruptcy petition, materially contributed to or increased the extent of his insolvency by gambling or by rash and hazardous speculations, and such gambling or speculations are unconnected with his trade or business; or (*b*) he has, between the date of the presentation of the petition and the date of the receiving order, lost any part of his estate by such gambling or rash and hazardous speculations as aforesaid. . . ." The appellant, who by his learned counsel has been described as possessing no merits at all, has succeeded in losing to bookmakers, who must have been very pleased to know that they would be paid no less a sum than £6,000, but he did not pay the Inland Revenue, and he left them to obtain such judgments by such processes as they saw fit, and he still did not pay. He was therefore prosecuted as coming within the mischief of section 157 (1).

The whole case turned on this debt to the Inland Revenue, and it was decided as a question of law by the learned Deputy-Chairman that such a debt could be regarded as a debt contracted "in the course and for the purposes of such trade or business." The learned Deputy-Chairman left to the jury the question whether the appellant had increased his insolvency by gambling, and on these two counts of the indictment the jury did not have much difficulty in arriving at the conclusion that the appellant had undoubtedly increased his insolvency by gambling, because he had not paid the Inland Revenue a debt due to them, a debt contracted in the course and for the purposes of such trade or business.

That is the point which has come to this court on the certificate of the learned Deputy-Chairman. This court has listened to the argument of Mr. Durand, who has put everything before us which could possibly be put, and has even succeeded in finding that which he did not find at the trial, namely, some authorities on the point. These authorities have been cited, and learned counsel for the Crown finds that he is quite unable to support the conviction on these two counts or to argue that a debt due to the Board of Inland Revenue by a man in business or a trader is a debt contracted in the course and for the purposes of such trade or business. This court has been concerned to find out—and it did not have much difficulty in so doing—what is the nature of the debt due to the Inland Revenue by way of income tax. Income tax is not a debt arising in the course of the trade or business, but it is the Crown's share of the profit after that has been ascertained. The authorities which have been cited to the court go to show that which was already known and very well established: that a trader cannot deduct from his profits the cost of having to pay damages to somebody who happens to have been injured by a faulty chimney on licensed premises. He cannot deduct the costs of bringing an action against the Board of Inland Revenue on a matter concerned with income tax. He cannot deduct the cost of unsuccessfully defending an action brought against him by the Board of Inland Revenue. In other words, income tax is not a debt arising in the course of or out of the trade or business. It is a liability due directly to the Crown and it is calculated on the profits or gains in the course of the business, but has nothing to do with the actual business in the way of a trade debt. It is not a trade debt. It is a statutory liability which has to be paid, and it therefore could not possibly be held to come within the four corners of the words of the section, namely, a debt "contracted in the course and for the purposes of such trade or business."

It must seem very strange that a tax-payer who succeeds in delaying payment of his just dues to the tax collector can enjoy himself as much as he likes by gambling, and that when he is made bankrupt and it is found that his estate is considerably diminished by his activities in the gambling world that still would not come within the mischief of section 157 (1) (*a*).

1958
Feb. 10

AMEDEO VACCARI

Cassels J.,
Streatfeild J.,
Slade J.

The only answer this court can make to that is to say that that is not a matter for this court; that is a matter for Parliament. We have to interpret the law and the Act as we find it applicable to the trade or business of a man and to a debt which is contracted in course of and for the purposes of such trade or business.

The position, therefore, is that the convictions upon counts 1 and 2 must be quashed, but the conviction upon count 3 remains. That was a conviction for not keeping proper books. He does not in fact appeal against that conviction or sentence. There was no certificate for an appeal upon that conviction. He was sentenced to three months' imprisonment, and that three months he will of course serve, and as he has already served it with the exception of a day or two, he must still remain in prison until he has completed that sentence. To the extent which I have mentioned, this appeal is allowed and the convictions on counts 1 and 2 are quashed.

Conviction quashed in part.

Solicitors: Hardcastle, Saunders & Armitage, for the appellant.

BEFORE

MR. JUSTICE CASSELS, MR. JUSTICE SLADE AND
MR. JUSTICE HAVERS

ROBERT ANDERSON

1958
Mar. 3

Sentence—Outstanding Offences—Offences for which Prisoner Awaiting Trial by Court-Martial.

The appellant, a soldier, appeared at quarter sessions having been committed for sentence for larceny and at his request and the request of his commanding officer the court took into consideration a series of offences in respect of which he was awaiting trial by court-martial, including eight offences

1958
Mar. 3

ROBERT ANDERSON

Cassels J.,
Slade J.,
Havers J.

of larceny from other soldiers. All these offences were military offences, but also offences with which a civil court would have jurisdiction to deal.

Held, that as the offences were offences with which a civil court would have had jurisdiction to deal, quarter sessions were entitled to take them into consideration, but that they could not have done so, had they been purely military offences.

Appeal against sentence.

The appellant, a soldier, was convicted at a magistrates' court of larceny of a cash box and £5, and was committed to Northumberland Quarter Sessions for sentence. He was at the time awaiting trial by court-martial for a series of offences, including eight offences of larceny from other soldiers. The offences were all military offences, but also offences with which a civil court would have had jurisdiction to deal. On January 2, 1958, the appellant requested quarter sessions to take all these offences into consideration, and his commanding officer supported that request. Quarter sessions held that they had jurisdiction to take all the offences into consideration and agreed to do so. They passed a sentence of 18 months' imprisonment.

No counsel appeared.

CASSELS J.: Leave was granted to the appellant on an appeal against sentence to come before this court in order that this court might consider the question whether among the cases to be taken into consideration by the court of quarter sessions could be included offences that he had committed as a soldier. He had been awaiting court-martial proceedings for a series of charges which included eight charges of larceny from other soldiers. There is no question that they were military offences; equally there is no question that a civil court also would have had jurisdiction to deal with them. In those circumstances we have come to the conclusion that the court of quarter sessions was entitled to take them into consideration. It is to be observed further that the commanding officer of the appellant's unit asked particularly that the court should take those offences into consideration. If they had been purely military offences and not civil offences also, of course the civil court could not have taken them into consideration; but as they were actually civil offences as well as military offences, the court of quarter sessions, in our opinion, acted properly and we see no reason to interfere with the sentence that was passed.

Appeal dismissed.

[COURTS-MARTIAL APPEAL COURT]

BEFORE

MR. JUSTICE CASSELS, MR. JUSTICE SLADE
AND MR. JUSTICE HAVERS

ALBERT EDWARD MATTHEWS

1958
Mar. 3

Offences in Relation to False Documents—Knowingly Making False or Fraudulent Statement—Official Form Required to be Signed by Defendant—Form Signed in Blank—Knowledge that Another Person would Make False Entries on Form for Fraudulent Purpose—Army Act, 1881 (44 *&* 45 *Vict.* c. 58), *s.* 25 (1) (*a*).

The appellant, a staff sergeant stationed in Germany, was under the duty of sending blankets and clothing to a German laundry, details of the articles sent being entered on an official Army form signed by the appellant. By arrangement with the proprietor of the laundry the appellant signed these forms on a number of occasions in blank and handed them in that condition to the proprietor of the laundry, who filled in false particulars of the articles laundered and thus obtained large sums of money, part of which he paid to the appellant. The appellant admitted that he had received these sums from the proprietor of the laundry and that he knew when he handed the forms over to the proprietor that the proprietor was going to make false entries on them for some fraudulent purpose, though he stated that he believed the purpose was to enable the proprietor to make false representations to the income tax authorities. The appellant was convicted by court-martial on

1958
Mar. 3

ALBERT EDWARD MATTHEWS

Cassels J., Slade J., Havers J.

three charges of knowingly making a false or fraudulent statement in respect of three of such forms, contrary to s. 25 (1) (*a*) of the Army Act, 1881.

Held, that the court-martial was right in holding that the conduct of the appellant in respect of the forms amounted to the offences charged.

Appeal against conviction.

The appellant, Staff Sergeant Albert Edward Matthews, Royal Army Service Corps, was convicted at a general court-martial at Dusseldorf, Germany, of one offence of stealing public property when concerned in its care, contrary to section 17 of the Army Act, 1881, three offences of obtaining valuable securities by false pretences, and three offences of making a fraudulent statement in an Army form, contrary to section 25 (1) (*a*) of the Army Act, 1881. He also pleaded Guilty to four offences of stealing public property left in his care. He was sentenced to two years' imprisonment and to reduction to the ranks, which sentence was confirmed, but on petition by him the Army Council quashed his conviction on the charges of false pretences and reduced the sentence to 15 months' detention.

It was part of the appellant's duty to send blankets and other clothing to a German laundry. For this purpose the details of the articles sent were entered on an Army form which was signed by him. By arrangement with the proprietor of the laundry the appellant signed such forms in blank and handed them to the proprietor who filled them in with false particulars of articles laundered and thus obtained large sums. The appellant admitted that the proprietor of the laundry had paid him 400 marks on various dates in 1955 and 1956 in respect of these transactions and that he knew when he handed the forms over to the proprietor that the proprietor was going to make false entries on them for some fraudulent purpose, though he stated that he believed the purpose was to enable the proprietor to make false representations to the income tax authorities. Having been convicted on charges of making a false statement in an Army form, contrary to section 25 (1) (*a*) of the Army Act in respect of these transactions, the appellant appealed on the ground that the signing of the blank forms by him was only evidence of preparation for an offence and that there was no evidence that the fraudulent statements on the forms were made out by him.

G. C. Heseltine, for the appellant.
E. Garth Moore, for the Crown.

CASSELS J: The appellant, Staff Sergeant Albert Edward Matthews, reaches this court upon leave to appeal which was granted by the single judge against his convictions upon charges 14, 17 and 20 by a court-martial in Germany some months ago. He was sentenced to imprisonment and reduction to the ranks. The case arose out of the signing of certain forms by the appellant, and the particular section of the Army Act, 1881, under which those specific charges were made is section 25,* which provides "Every person subject to military law who commits any of the following offences, . . . (1) in any . . . document signed by him, or of the contents of which it is his duty to ascertain the accuracy (a) knowingly makes or is privy to the making of any false or fraudulent statement . . . shall on conviction by court-martial be liable to suffer imprisonment. . . ."

Among the duties of the appellant in his position of staff sergeant was the responsibility of dealing with certain equipment, bedding and linen, which had to go to the laundry. It would go to a German laundry for the purpose of being laundered, and there was a particular form on which the articles had to be entered. The particular form which was under consideration in the course of this case was Form F. 683, which is used for the exchange of hospital and barrack bedding and linen, and the form had to be issued by the appellant in his position as staff sergeant.

The short facts are that, by collusion between the appellant and the proprietor of the laundry, the appellant signed forms in blank and then allowed them to leave his possession without anything being filled in and to go to the proprietor of the

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* The corresponding section in the Army Act, 1955, is s. 62.

1958
Mar. 3

ALBERT
EDWARD
MATTHEWS

Cassels J.,
Slade J.,
Havers J.

laundry, who falsely and fraudulently and to the knowledge of the appellant filled in a very large number of items. That form enabled the proprietor of the laundry to obtain sums of money to which he was not entitled. That scheme was carried out in three particular instances which were before the court-martial which tried the appellant and, in the course of the proceedings, a statement which had been made by him indicated that this particular scheme of fraud was first mentioned to him by his predecessor when he took over. In referring to that, he said: "Staff Sergeant Hughes said to me in general conversation that if I submitted one dummy slip a month to the laundry (by this he meant the B.A.O.R. Form 683) I would receive the sum of 400 marks. I did this on the first occasion; I think if you check up you will see that I signed one for March or April, 1955. I got the 400 marks from the owner of the laundry personally. I went up to the laundry to collect it. When I got to the laundry I found it full of W.D. furniture and to tell you the truth it looked like a barrack office." Then, a little further on: "I put dummy forms in to the laundry about once every two or three months after this, because the manageress of the laundry said that if I didn't she could make it hard for me." It transpired in the course of the evidence that he was under the impression that the provision of these dummy forms duly signed by him was really for the purpose of the laundry proprietor being able to make false representation to the income tax authorities with regard to the amount of work upon which the laundry was engaged.

The court-martial had to consider the evidence upon these particular charges, and they came to the conclusion that the appellant was guilty. It was thought that there was a matter for the consideration of this court whether if a person has signed a blank form, with the intention that it should be filled up for a fraudulent purpose, in other words, if he has had no part in the filling up and in fact the form was blank when he did sign it, he could be guilty under section 25 (1). It is necessary to look at the words of the particular subsection

1958
Mar. 3

ALBERT
EDWARD
MATTHEWS

Cassels J.,
Slade J.,
Havers J.

"knowingly makes or is privy to the making of any false or fraudulent statement." There never was any question that the particular items which were typed on to this form had had any existence at all. They were filled up in very large numbers indeed, such as 172 kitchen cloths, 65 sheets, vast numbers of towels and blankets to the amount of 500.

This court has listened to an argument quite properly presented to it, but has come to the conclusion that the acts of the appellant clearly come within the section. It may well be that he could have perhaps more technically and correctly been charged with being privy to the making of any false or fraudulent statement, because there was upon the form when it left him nothing except his own signature. It may well be that the particular offences might properly have been charged under the words "privy to the making of any false or fraudulent statement," but there was evidence before the court which entitled it to come to the conclusion that there was between the appellant and the proprietor of the laundry a preconceived scheme which was being carried out whereby if the appellant provided the dummy form, which is of course printed officially, and signed it, then the particular scheme could be put into operation by further acts on the part of or on behalf of the laundry proprietor. One is not surprised that the members of the court-martial should have come to the conclusion that the appellant was carrying out his part of the scheme in providing the blank form duly signed and letting it leave his office or his branch, being fully aware of the fact that the laundry proprietor was going to put the form to a fraudulent use. It matters not if his impression was that it was going to be used only for the purpose of supplying false information to the income tax authorities, whoever they may be, in Germany. That does not matter, but it is material that, according to the appellant's own statement, when he was carrying out his part in the scheme, he made his way to the laundry to collect his reward for having supplied these particular forms, and his reward was in the form of 400 marks.

1958
Mar. 3

ALBERT EDWARD MATTHEWS

Cassels J., Slade J., Havers J.

In those circumstances, this court has come to the conclusion that, although it was a perfectly proper case to put before it, the convictions upon these charges must stand, and so far as these charges are concerned the appeal is dismissed.

[His Lordship then dealt with the appellant's application for leave to appeal against his convictions on other charges, and said that in the opinion of the court the application should be refused.]

Appeal dismissed.

[IN THE HOUSE OF LORDS]

BEFORE

VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD SOMERVELL OF HARROW AND LORD DENNING

1958
Jan. 15, 16,
March 6

DIRECTOR OF PUBLIC PROSECUTIONS *v.* HEAD

Mental Deficiency—Carnal Knowledge of Mental Defective—Woman on Licence from Institution—Alleged Illegal Detention—Irregularity in Original Order—What Documents should be made Available at Trial—What Prosecution must Prove—Mental Deficiency Act, 1913 (3 *&* 4 *Geo.* 5, *c.* 28), *ss.* 1, 9, 56 (1) (*a*) (*replaced by Sexual Offences Act*, 1956 (4 *&* 5 *Eliz.* 2, *c.* 69), *s.* 8).

The appellant was convicted of carnal knowledge of a woman on licence from an institution for mental defectives, contrary to section 56 (1) (*a*) of the Mental Deficiency Act, 1913 (now s. 8 of the Sexual Offences Act, 1956). For the purpose of proving that she was lawfully detained as a defective and let out on licence the prosecution produced an order made by the Home Secretary under section 9 of the Act of 1913, dated July 2, 1947, for her transfer from an approved school where she then was to a certified institution as defined in the Act. The order was based on the certificates of two doctors who had examined her. Each doctor certified that he had satisfied himself that she was a moral defective, but neither certificate stated sufficient facts to warrant that conclusion. The prosecution conceded that this omission rendered the order defective and that on an application for habeas corpus it would have been quashed and the woman would have been released. Subsequent orders transferring her to other institutions and finally to the institution from which she had been released on licence were also put in evidence. The Court of Criminal Appeal (1957) 41 Cr.App.R. 249 quashed the conviction on the ground that section 56 (1) (*a*) of the Act of 1913 could not apply to a woman who had not been found to be a mental defective under the Act or to one who had been unlawfully detained in an institution even though she was there receiving care or treatment as a mental defective and that the original order, being invalid, could not be cured by the continuation orders. On appeal by the Crown to the House of Lords, *Held* (Viscount Simonds dissenting) that the decision of the Court of Criminal Appeal should be affirmed (per Lord Reid, Lord Tucker and Lord Somervell of Harrow) on the ground that, though proof that a woman was detained in a specified institution under care or treatment as a defective or the production of a licence showing her to be out on licence from a place to which the system of licences under the Act applied was *prima facie* evidence that she was a defective lawfully under care or treatment as such, yet, when it was shown (as in the present case) on the face of the documents produced and received in evidence that the detention was illegal, the presumption of defectiveness disappeared and the prosecution must fail; and where the original order of detention was invalid, it could not be cured by the production of continuation orders coupled with oral evidence that she was at the material date a defective.

Per Lord Denning. The prosecution were bound to prove that the woman was lawfully detained and lawfully under care or treatment as a defective, though they did not have to prove that she was in fact a defective. The issue should, however, have been approached by the consideration of the question whether the original order was void or merely voidable. As it had been made by the Home Secretary by a wrong exercise of a jurisdiction which he had and not by usurpation of a jurisdiction which he had not, it should have been regarded as merely voidable and therefore as remaining good until it was quashed and as sufficient to support the continuation orders made on the faith of it. On this basis the detention of the woman should have been held lawful. In quashing the conviction the Court of Criminal Appeal had, therefore, acted on a mistaken ground, but, as their decision had been founded on admissions made by the prosecution and as the question

1958
Jan. 15, 16,
March 6

DIRECTOR OF PUBLIC PROSECUTIONS *v.* HEAD

Viscount Simonds, Lord Reid, Lord Tucker, Lord Somervell of Harrow, Lord Denning

whether the order was void or voidable had never been argued in that court, it would not be right in the present case for the House of Lords to restore the conviction.

On a prosecution for this offence the prosecution should have in court and make available for inspection by the defence the relevant orders or other documents on which the prosecution is based (*per* Lord Reid, Lord Tucker and Lord Somervell of Harrow) in order to give the defence the opportunity of rebutting the presumption of legality in a proper case, despite the fact that the prosecution are not bound to rely on the documents to prove the legality of the detention (*per* Lord Denning) because the prosecution are bound to base proof of the legality of the detention on the production of the relevant documents, which are the best evidence of the legality and which, on production of the originals from proper custody, are receivable in evidence without further proof except as regards identification of the person who is the subject of the inquiry.

Appeal by the Crown against order of Court of Criminal Appeal allowing appeal against conviction (1957) (41 Cr.App. R. 249).

The respondent, John Shortriggs Head, was convicted at Cumberland Assizes on May 25, 1957, on two charges of carnal knowledge of a mental defective, contrary to section 56 (1) (*a*) of the Mental Deficiency Act, 1913, and was sentenced by Hinchcliffe J. to concurrent terms of four months' imprisonment.

The woman was at the time of the alleged offence on licence from Dovenby Hall Hospital, an institution for mental defectives. It was not disputed that carnal knowledge had taken place and that the respondent knew that she was on licence from the hospital, but the defence was that the woman had never legally been certified as a mental defective, that her detention for care and treatment had been illegal and that consequently she was not subject to any licence, so that no offence had been committed.

In April, 1945, when she was sixteen years of age, she was committed by justices to an approved school under section 72 (3) of the Children Act, 1933. The record of information prepared under the Act stated that her conduct at school gave no trouble, that her school character was good, that she was somewhat forward and that her ability was average, but that her character in employment was unsettled and not satisfactory. Her mental ability was described as apparently normal.

On June 10, 1947, she was examined by two medical men separately, each of whom certified that he had satisfied himself that she was a moral defective, but neither stated sufficient facts to warrant that conclusion. On July 2, 1947, the Secretary of State made an order in the following terms: "Whereas, in pursuance of section 9 of the Mental Deficiency Act, 1913, the above named . . . has been duly certified to be mentally defective within the meaning of the above mentioned Act as subsequently amended, I hereby order that she be transferred from the school in which she is now detained to the Convent of the Good Shepherd Certified Institution of St. Anne's, Saltash, Cornwall." Within a few days of going to the convent she was found to be of such dangerous or violent propensities that the Board of Control ordered her to be removed to the Moss Side State Institution, Liverpool, a place specially set aside for serious cases of mental defectiveness. While she was there, continuation orders were made, and when she became of age in July, 1949, the statutory visitors reported that she was a moral defective and a proper person to be detained, and neither she nor her parents appealed from that decision. Later she improved and was sent to Dovenby Hall. In 1954, the medical superintendent of that hospital, who gave evidence at the trial, classified her as a "feeble-minded person" rather than a "moral defective." The Board of Control made a further continuation order. On October 31, 1955, she was licensed to St. Catherine's College, Keswick, and there worked as one of the domestic staff. On two occasions in October, 1956, while she was still on licence, the appellant had carnal knowledge of her. In October, 1957, she was discharged as cured, and soon afterwards married another man.

Sir Reginald Manningham-Buller, Q.C. (A.-G.) for the Crown. The Act of 1913 does not require that the woman should have been dealt with as a mental defective under the Act. On

Dr. Ferguson's evidence it is irrelevant whether Elfreda Henderson was lawfully detained. The Act of 1913 does not require proof of valid certification or of a valid order as an ingredient of an offence under section 56. The prosecution must prove that the woman was a mental defective, but not necessarily a defective under section 56 (1) (*a*), because it is to be inferred that the woman is a mental defective if she is under care and treatment in an institution or certified house or approved home or whilst on licence therefrom. By section 1 of the Act mental defectiveness is a question of fact. This is supported by section 2 of the Act, which gives instances of treatment otherwise than under the Act.

The Crown is prepared to argue the case on the basis that the original order of the Home Secretary was not valid, but different considerations apply to the subsequent orders and in particular to an order of the Board of Control dated October 5, 1948. With regard to the production of the "relevant documents" required by the Court of Criminal Appeal, the medical superintendent is not competent to produce any of the certificates. Care and treatment can be proved as a fact without the production of documents. Under section 56 (1) (*a*) there is no need for the prosecution to prove the certificates or an order. If this burden rested on the prosecution, it would in many cases be impossible to discharge it. Under section 56 (1) (*b*) (*c*) and (*d*) and (*e*), which refer to a "defective" (which section 56 (1) (*a*) does not), a certificate would be inadmissible. If the Court of Criminal Appeal is right, only under section 56 (1) (*a*) is it necessary to prove that the woman is legally certified and legally detained, and the section does not say so. There is no provision in the Act of 1913 for the production of the order and certificates; see for example section 11 (5) of the Act. The prosecution is not competent to prove them, and the Documentary Evidence Act, 1868, is not applicable. The question is: Was the woman under care and treatment in an institution for mental defectives? It is a question of fact whether she was a mental defective. On four occasions after the Secretary of State's order the woman was examined. Such examinations could only be made if she was a mental defective at the time and this supports the view that mental defectiveness is a question of fact: see R. *v.* COOK [1954] 2 All E.R. 60. Licence also is a question of fact. The licence is not a licence to the defective but to the person responsible for the defective. The Lord Chief Justice's view was that the prosecution had to prove that the woman had lawfully been made subject to the Act. But section 56 is applicable whether a person is subject to the Act or not; for example, a voluntary patient may go for treatment in an institution. What is a " mental defective "? Section 1 of the Act shows that this is a question of fact. It is not a question of someone being " found " to be defective, nor is it a question of someone being in an institution in consequence of an order. Under section 56 of the Act it is not a matter of status, but a question of fact. The woman must have been a mental defective within one of the categories of section 56 for all the orders to have been made. Section 1 of the Act does not require classification. The reason given in the certificates, even if wrong, is insufficient to nullify the reclassification by the medical superintendent, who gave sworn evidence which was unchallenged and not cross-examined. If everything the Court of Criminal Appeal said is correct, how are the documents to be proved? Any objection to their production by the defence must be sustained. Therefore the prosecution is bound to fail unless the person making the documents is called; the documents do not prove themselves. Section 3 of the Act is linked with section 12, which refers to parents and guardians; see also section 4, which deals with other methods. How is the order of a judicial authority to be proved? The courts of stipendiary and ordinary magistrates are not courts of record; see Taylor on *Evidence* (12th edition), 990, 2nd Vol., p. 1572. There is no record in a minute book of the original examination; see Vol. 17 of Halsbury's *Statutes*, p. 1064, " the procedure in practice is *informal*." There is difficulty in proving an order made by a magistrate under section 4 of the Lunacy Act, 1890, without calling the magistrate.

Section 56 (1) (*a*) of the 1913 Act applies the whole of the Act, not just to mental defectives found to be such *under* the Act. Section 56 applies to persons in approved homes, but such persons cannot be there under an order. The trial in this case was the trial of the accused, not the trial of the Board of Control. Protection of women like Elfreda Henderson does not depend upon an order or upon certificates, but upon mental defectiveness. The protection given by the Act is a protection for defectives. The prosecution proves the fact of care and treatment and the fact of mental defectiveness. Habeas corpus proceedings require a return to the writ, and reasons for the detention; the facts need not be set out. Verification by affidavit follows, and the court has no power to inquire into the truth. The truth of the return in criminal cases cannot be traversed; civilly, see the Evidence Act, 1938, section 1 (1) and (2). In R. *v.* BOARD OF CONTROL, *Ex p.* RUTTY [1956] 2 Q.B. 109 affidavit evidence was admitted. The practice in such proceedings is of no assistance with regard to proof of the documents in these proceedings; see Documentary Evidence Act, 1868, section 2. It is useful also to consider the position of voluntary patients under the Mental Treatment Act, 1930; see Halsbury's *Statutes*, Vol. 17, p. 1230. If all the prosecution's arguments are wrong, what are the "relevant documents"? [He referred to SMITH *v.* EAST ELLOE R. D. C. [1956] A.C. 738.] The prosecution do not have to produce any documents. If the prosecution does have to produce documents, they would consist of only the order which warranted the original detention and the continuation orders. The plain words of the Act of 1913, section 56 (1) (*a*) require proof of mental defectiveness, not of lawful detention. With regard to the meaning of the words "whilst placed out on licence therefrom" it is recognised that it is a difficult point to answer, how can a person be on licence unless that person is lawfully detained. But is the Act of 1913 contemplating only persons lawfully detained? The question of licence is a question of fact—was the woman out on licence or was she not? The question is not: was she lawfully out on licence?

Viscount Simonds, Lord Reid, Lord Tucker, Lord Somervell of Harrow, Lord Denning

[VISCOUNT SIMONDS: You say that the Act is for the protection of defectives, that it is immaterial that the original order was invalid and that all the prosecution have to prove is that the woman was a defective. Is that the way in which you put it?]. Yes.

Rodger Winn, following for the Crown.

The fact that the detention is lawful is not an element which has to be proved by the prosecution. If the evidence leaves it in doubt whether at the time of the alleged offence the woman was a mental defective, the accused person is entitled to be acquitted. The wording of the section does not require the prosecution positively to prove that the woman was a mental defective, but it is left open to the defence to say that the question whether she was a defective is left in reasonable doubt.

[LORD REID: That is the same as saying that the prosecution must prove beyond reasonable doubt that she was a mental defective].

To prove defectiveness for the purposes of section 1 (2) one must prove defectiveness before the age of eighteen. In any case, where the woman is now substantially over that age it may be impossible to prove such defectiveness beyond reasonable doubt. The prosecution are entitled to confine themselves to proving what the section contemplates. [He referred to RICHARDSON *v.* LONDON COUNTY COUNCIL [1957] 2 W.L.R. 751].

A. S. Booth also appeared for the Crown.

G. W. Guthrie Jones, for the respondent.

To support a conviction under section 56 (1) (*a*) of the Mental Deficiency Act, 1913, the prosecution must prove: (1) an act of intercourse or attempted intercourse between the accused and the woman concerned; (2) that the woman was at the material time a mental defective and was under treatment as such in an institution, certified house or approved home to which the Act applies or was out on licence therefrom; and (3) that the woman was at the material time legally detained in such an institution, certified house or approved home.

Even if under submission (2) the fact of care and treatment in an institution, etc., raises a presumption of mental deficiency, it is open to the defence at the trial to displace that presumption by cross-examination of the medical witnesses and by calling medical evidence in rebuttal and the issue of mental deficiency or otherwise is an issue which should be left to the jury. This proposition arises from the wording of the proviso to section 56 (1), for one of the ways in which the defendant may prove that he did not know and had no reason to suspect that the woman was a defective is to prove that she was not such in fact. Similarly, where the statement of offence in the indictment reads " carnal knowledge of a mental defective " the issue of mental deficiency or otherwise is one for the jury. In the present case the learned judge withdrew this issue from the jury's consideration. The reason why the words " mental defective " do not appear in section 56 (1) (*a*) of the Act is that sections 2 and 4 require a woman to be a mental defective before she may be dealt with under the Act and the provisions of sections 49 and 50 (which refer to certified houses and approved homes) also refer to " defectives." Further in the definitions of " certified institution," " certified house " and " approved home " in section 71 of the Act the word " defective " in each case appears.

As to submission (3), as section 56 (1) (*a*) is dealing with defectives, it follows that such defectives are defectives " within the meaning of this Act " as stated in section 1. The woman was not found to be a defective within any of the four categories in section 1. It is not competent for the prosecution to prove that she was in fact a mental defective if she was not one within the Act. Under section 9, under which the order of detention was made, the Home Secretary must be satisfied that the woman was a defective, *i.e.*, one who falls within one of the categories in section 1. The medical certificates in support of the Home Secretary's order provided no ground upon which the woman could be said to fall into any of the four categories and the school reports also attached to the order were inconsistent with the definition of mental defectiveness in section 1 (2). The words " under this Act " in section 56 (1) (*a*) are to be read distributively and apply to the expression " under care and treatment " and " whilst placed out on licence." The woman was not a defective under the Act and was unlawfully detained. Parliament should not be supposed to have been legislating for persons unlawfully detained. Once the original order is invalid, it cannot be validated by continuation orders, which have no separate existence apart from the order they purport to continue. If the Home Secretary purports to create a new category of mental defective outside the terms of the Act, his order is not an erroneous exercise of jurisdiction, but is an act outside his jurisdiction and, therefore, the original order is not voidable but void. The same safeguards do not exist in the case of continuation orders as in the case of the original order.

At the material time the woman was placed out on licence. Because she was unlawfully detained no power to grant a licence existed. At the expiry of the licence she was under no obligation to return to the institution. Her status was therefore no different from that of any normal woman of full age.

No difficulty arises with regard to proof of the order for detention. The original order should be produced, not to prove its contents but as real evidence, *viz.* the authority to detain the woman, as a record of conviction in the case of imprisonment. Proof of lawful detention in a prosecution under section 56 (1) (*a*) is the same as proof of lawful detention in habeas corpus proceedings, *i.e.*, by production of the original order from proper custody as the authority for the detention. The effect of the original order as the authority for the detention is referred to in section 10. The provisions of section 11 (5) of the Act of 1913 facilitating proof of a continuation order are not necessary in respect of an original order justifying the detention. The difficulties referred to by the Attorney-General relating to proof of the original order if well founded would

1958
Jan. 15, 16,
March 6

Director of Public Prosecutions *v.* Head

Viscount Simonds, Lord Reid, Lord Tucker, Lord Somervell of Harrow, Lord Denning

mean that the Board of Control could not prove lawful detention until at least one continuation order had been made.

Where a woman voluntarily submits to treatment as a mental defective under the Mental Treatment Act, 1930, she does not come within the terms of section 56 of the Act of 1913. If she becomes a voluntary patient in an institution within the Act of 1913, she clothes herself with the necessary status for the application of section 56 of that Act. In the present case, however, the woman was involuntarily and invalidly detained as a person falsely imprisoned and thus the subject of a tort. Such a person is distinguishable from a voluntary patient. In the present case, if the prosecution is right, the act of intercourse becomes a crime by reason only of the fact that the woman is a victim of false imprisonment.

Finally, the proviso to section 4 (1) of the Criminal Appeal Act, 1907 should not be applied in a matter of this sort.

Sir Reginald Manningham-Buller, Q.C. (A.-G.) replied.

The House took time for consideration.

March 6. The following opinions were read:

Viscount Simonds—My Lords, The facts of this case are fully set out in the opinion of my noble and learned friend Lord Tucker. I will not occupy time by stating them myself, though I am conscious that the few observations that I have to make are not easily intelligible without them. I do not doubt that questions of great importance are directly or indirectly raised by the judgment of the Court of Criminal Appeal in this case, but in accordance with the practice which has consistently been observed since the Court of Criminal Appeal was established they were not formulated for the consideration of the House. In the result I have for my part found it difficult to determine exactly what is the question for decision—and by that I mean, of course, the question which is at issue between the appellant and the respondent in this appeal. I should not think it desirable, particularly in a criminal case, to travel outside that issue.

The bald facts of the case are that the respondent was charged with having had carnal knowledge of a woman who was placed out on licence from an institution for mental defectives, contrary to section 56 (1) (*a*) of the Mental Deficiency Act, 1913. He was convicted, but upon appeal the conviction was quashed. It was quashed upon the ground that the woman was not lawfully detained in the institution. The Lord Chief Justice said that where a man was prosecuted for this offence (now an offence against section 8 of the Sexual Offences Act, 1956) "evidence must be given by the production of the relevant documents that the woman in respect of whom the charge is made was at the time of the offence lawfully subject to the Act." Donovan J. used similar language. The documents under which the woman was detained were in fact produced at the trial. I need say no more than that on the face of them they appeared to be defective. The Attorney-General in the Court of Criminal Appeal admitted that in appropriate proceedings they could be sucessfully challenged, *e.g.*: upon a writ of habeas corpus. He did not recede from this admission before the House, but contended that it was irrelevant whether or not in such proceedings they could be challenged. He urged that the relevant section of the Act was passed for the protection of a certain class of women, amongst them women "under care or treatment in an institution . . . or whilst placed out on licence therefrom." He conceded that in its context the expression "under care or treatment" meant under care or treatment as a mental defective, but contended that, if the woman was in fact under such care or treatment in an institution or placed out on licence therefrom, it was not open to the defendant to question the legality of the detention. He pointed out that the proviso gives adequate protection to a man who, being charged with the offence, proves that he did not know and had no reason to suppose that she was a defective.

My Lords, this House no less than other courts of law is traditionally jealous to safeguard the liberty of the subject; but I agree with the learned Attorney-General that such a consideration is irrelevant to the present case. Is it the man's liberty or the woman's that is at stake? Not his, unless a man is to be at liberty to have carnal knowledge of any woman who is under treatment in an institution on the chance that a defect may be found in the order of detention; nor hers, for she is not a party, nor are the proper authorities parties, to the proceedings, and her eventual liberty will be determined by other considerations beyond those of a defect in an order made many years ago.

I speak with diffidence knowing that I differ from the Court of Criminal Appeal and from the majority of your Lordships, but I cannot refrain from saying with what anxiety I regard the possibility that, as a result of this decision, whenever a man is charged with this offence, he can, though he knows that the woman is under care or treatment as a mental defective, demand to see all " the relevant documents " (whatever they may be) and finding perchance a flaw in them, successfully plead that she was not lawfully detained and that he therefore has committed no offence. I must, I think, assume that any defect which would support a writ of habeas corpus would be available to him, and further that the same result would follow whether the woman was, as in the present case, on the high road to recovery or was such a defective as to stand in particular need of the protection afforded by the Act. I would therefore decline to read section 56 of the Act as imposing on the prosecution the burden of proving that the person under care or treatment in an institution or placed out on licence therefrom was not only in fact under such care or treatment or so placed out on licence, but also was lawfully detained.

The Attorney-General supported his case by the plea that, if the prosecution had to prove lawful detention of an inmate of an institution, the burden of proof might be very heavy, and this plea was much debated. If upon its true construction the section imposes this burden, I respectfully doubt whether it is material that the burden is heavy or light. In the view which I take this question does not arise, but, if it did, I should be content to adopt what my noble and learned friend Lord Tucker says about it and I would join in the reservations made by my noble and learned friend Lord Somervell of Harrow.

One other point should be mentioned. It was not clear to me whether one of the questions at issue in this appeal was whether in a prosecution for this offence the Crown must prove that the woman was at the time of the offence a mental defective. I think that at one time the learned Attorney-General was inclined to accept that burden. But, if so, he was in my opinion wrong. I believe that all your Lordships take the same view. The appeal will in accordance with your Lordships' opinion be dismissed with costs.

LORD REID—My Lords, I have had the advantage of reading the speeches about to be delivered by my noble and learned friends. I agree with that of Lord Tucker and I would concur in the reservations to be made by Lord Somervell of Harrow.

LORD TUCKER—My Lords, on May 22, 1957, the respondent was convicted of two offences against section 56 (1) (*a*) of the Mental Deficiency Act, 1913, after a trial before Hinchcliffe J. and a jury at the Cumberland Assizes held at Carlisle. He appealed to the Court of Criminal Appeal who quashed his conviction on November 1, 1957. The Director of Public Prosecutions now appeals to this House pursuant to the certificate of the Attorney-General granted on November 11, 1957.

The indictment contained two counts alleging that the respondent on two occasions in October, 1956, had carnal knowledge of a girl named Elfreda Henderson, a mental defective on licence from an institution for mental defectives. It will suffice to set out one of these counts, which reads as follows: "*Statement of Offence*: Carnal knowledge of mental defective, contrary to section 56 (1) (*a*) of the Mental Deficiency Act, 1913. *Particulars of Offence*: John Shortriggs Head on the 7th day of October, 1956, in the County of Cumberland, had carnal knowledge of Elfreda Henderson a woman on licence from Dovenby Hall Hospital, an institution for mental defectives." The superintendent of Dovenby Hall gave evidence for the prosecution and produced and put in evidence certain documents relating to the girl Henderson for the purpose of proving that she was lawfully detained as a defective and duly let out on licence on the material date. The documents included an order made by the Home Secretary under section 9 of the Mental Deficiency Act, 1913, and dated July 2, 1947, for Henderson's transfer from an approved school where she then was to a certified institution as defined in the Act in Cornwall. Subsequent orders transferring her to other institutions and finally to Dovenby Hall were also produced. The licence permitting her to be absent was not put in evidence. Donovan J. in the Court of Criminal Appeal was mistaken in thinking it had been proved and received in evidence.

Counsel for the defence challenged the validity of the girl's detention and certification as a defective as disclosed by these documents. Hinchcliffe J. ruled that the Home Secretary's order of July 2, 1947, was conclusive and the defence could not go behind it and in his direction to the jury he told them as a matter of law that on the documents produced Henderson was properly certified as a defective and on the uncontradicted evidence of the superintendent, Dr. Ferguson, she was a mental defective. In substance, therefore, the only real issue left to the jury was as to the acts of carnal knowledge which were proved by the girl and not seriously challenged. Having been warned by the superintendent, when the girl had been out on licence on a previous occasion, that she was a patient on licence from the institution as a defective, a defence under the proviso to section 56 was not open to the respondent and he did not give evidence. He was accordingly convicted. Amongst the documents put in evidence at the trial were the two medical certificates required by section 9 of the Act for the satisfaction of the Secretary of State before he could make a valid order for the girl's transfer to an institution at which she would be under compulsory detention as a defective. These certificates stated that she was a moral defective, but neither of them showed that she "required care, supervision and control for the protection of others" which is, by section 1 of the Mental Deficiency Act, 1913, as amended by the Act of 1927, an essential requirement before any person can be classified as a moral defective. In the Court of Criminal Appeal (Lord Goddard C.J., and Havers and Donovan JJ.) the Attorney-General admitted the invalidity of the original order of the Secretary of State, and the court, holding the resulting detention unlawful, quashed the conviction. In the Court of Criminal Appeal two judgments were delivered, one by the Lord Chief Justice and one by Donovan J. The Lord Chief Justice stated the contention of the Crown as follows: "The Attorney-General submitted that all that the prosecution had to prove to establish a case in addition to the fact of carnal knowledge having taken place was that the girl was in fact in an institution for care and treatment or that she was out on licence from such an institution. He submitted that the section did not require proof that the girl was a defective." Before your Lordships I understood the Attorney-General to say that the prosecution must prove that the girl in question was an inmate in one of the institutions named and receiving care and treatment therein or on licence therefrom and that at the time of intercourse she was a mental defective. I understood this as meaning that proof of mental deficiency must be given in addition to and independently of the fact of lawful detention. At the conclusion of his judgment the Lord Chief Justice said: "So that there may be no doubt on the matter I desire to say that where a man is prosecuted for this offence which is now an offence against section 8 of the Sexual Offences Act, 1956, evidence must be given by the production of the relevant documents that the woman in respect of whom the charge is made was at the time of the offence lawfully subject to the Act." Donovan J. used these words: "Accordingly I think the prosecution were right to produce the various documents relating to the woman's detention, and to produce the licence. Nor do I think that such a practice, which ought to be followed, can lead to any great difficulty unless there are many of these patients illegally detained, which I prefer not to suppose." The Attorney-General submitted that these statements placed a burden on the prosecution which was not

1958
Jan. 15, 16,
March 6

DIRECTOR OF PUBLIC PROSECUTIONS *v.* HEAD

Viscount Simonds, Lord Reid, Lord Tucker, Lord Somervell of Harrow, Lord Denning

justified by the Act, and that they would tend to result in a trial within a trial of issues more suitable to proceedings by way of habeas corpus or certiorari or in actions for false imprisonment, and that the necessity for strict proof of documents made or facts having taken place many years ago would in some cases render prosecutions impossible.

My Lords, it will be apparent from what I have said, and indeed the Court of Criminal Appeal so stated, that this appeal raises questions of considerable importance with regard to the construction of section 56 of the Act and the matters essential for the prosecution to prove. It may be convenient at this stage to set out section 56 (1) in full and to refer to certain other sections of the Act before stating what I consider to be the answer to the problems which have been raised. "Section 56 (1)—Any person—(*a*) who unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of, any woman or girl under care or treatment in an institution or certified house or approved home, or whilst placed out on licence therefrom or under guardianship under this Act; or (*b*) who procures, or attempts to procure, any woman or girl who is a defective to have unlawful carnal knowledge, whether within or without the King's dominions, with any person or persons; or (*c*) who causes or encourages the prostitution, whether within or without the King's dominions, of any woman or girl who is a defective; or (*d*) who, being the owner or occupier of any premises, or having or acting or assisting in the management or control thereof, induces or knowingly suffers any woman or girl who is a defective to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally; or (*e*) who, with intent that any woman or girl who is a defective should be unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally, takes or causes to be taken such woman or girl out of the possession and against the will of her parent or any other person having the lawful care or charge of her; shall be guilty of a misdemeanour and shall be liable upon conviction on indictment to be imprisoned . . . for any term not exceeding two years unless he proves that he did not know, and had no reason to suspect, that the woman or girl was a defective." Section 1 (as amended) defines mental defectives and the provisions thereof relevant to the present case are as follows: "1. (1)—The following classes of persons who are mentally defective shall be deemed to be defectives within the meaning of this Act: (*a*) Idiots (who are defined); (*b*) Imbeciles (defined); (*c*) Feeble-minded persons (defined); (*d*) Moral defectives, that is to say, persons in whose case there exists mental defectiveness coupled with strongly vicious or criminal propensities and who require care, supervision and control for the protection of others: (2) For the purposes of this section mental defectiveness means a condition of arrested or incomplete development of mind existing before the age of eighteen years, whether arising from inherent causes or induced by disease or injury." Section 2 provides for defectives being dealt with under the Act by being sent to or placed in an institution or placed under guardianship. Section 3 deals with sending a defective to an institution or placing him under guardianship by order of a judicial authority or under order of a court, or in the case of a defective detained in a prison or other specified place of a like nature by order of the Secretary of State. Section 10 authorises the detention of a defective sent to an institution under order, and of a defective placed under guardianship by any such order, and by subsection (2) provides that subject to regulations an order placing a defective under guardianship shall confer on the person named as guardian such powers as would have been exercisable if he had been the father of the defective and the defective had been under the age of 14. Section 12 (2) enacts that subject to the foregoing provisions of the section a defective placed by his parent or guardian in an institution or under guardianship may be detained. Section 30 places upon local health authorities the duty to ascertain what persons within their area are defectives subject to the

1958
Jan. 15, 16,
March 6

DIRECTOR OF PUBLIC PROSECUTIONS *v.* HEAD

Viscount Simonds, Lord Reid, Lord Tucker, Lord Somervell of Harrow, Lord Denning

Act (otherwise than under paragraph (*a*) of subsection (1) of section 2), and to make provision for them. Section 49 applies to certified houses all the provisions of the Act relating to institutions and the patients therein. Section 50 enables the Minister of Health to approve of certain premises wherein defectives are received in certain circumstances and such premises are referred to as an approved home. Subsection (2), however, enacts that it shall not be lawful to receive or detain in an approved home any person ordered to be sent to an institution for defectives under an order of the judicial authority or a court or a Secretary of State. Section 56 is in Part IV of the Act which deals with offences and legal proceedings. Section 52 is, I think, worth setting out. It reads: " If any person having been warned by a person appointed to be guardian of a defective under this Act, or by a person under whose charge a patient absent from an institution or from a certified house has been placed, not to supply intoxicants to or for the use of the person under his guardianship or charge, knowingly supplies any intoxicants to or for the use of that person he shall be guilty of an offence under this Act: Provided that a person shall not be guilty of the offence of supplying intoxicants in contravention of warning if the person giving the warning refuses, when required so to do, to produce the authority under which he acts." It will be observed that the last-mentioned section does not create the offence of knowingly supplying intoxicants to a defective, but of supplying intoxicants after warning to " a person " under guardianship or absent from an institution.

Returning to section 56, here also it will be noticed that nowhere is the simple offence of having carnal knowledge of a defective created, and in subsection (1) (*a*) the word " defective " does not appear. The Court of Criminal Appeal construed the words " under this Act " at the conclusion of subsection (1) (*a*) distributively as applying to the preceding words " under care or treatment in an institution or certified house or approved home, or whilst placed out on licence therefrom," and concluded that the subsection applies—to quote from the judgment of Donovan J.—" only to a person who has been found to belong to one of the four categories of defectives specified in section 1, and who is in consequence of an order made under the Act having care or treatment in an institution or is out on licence by virtue of regulations made under the Act." My Lords, I think the presence of the words " or approved home " negative this construction, as there is no machinery anywhere in the Act for placing anyone in an approved home by order or in any other manner. In the present case, however, your Lordships are concerned only with the case of a person who had purported to be detained in, and let out on licence from, an institution under the provisions of the Act. In my opinion, the subsection has been carefully framed for the protection of persons who are undergoing care or treatment as defectives in certain specified institutions, or are on licence or under guardianship under the provisions of the Act.

The Lord Chief Justice observed that it would no doubt be presumed that prima facie a person in a certified institution was a defective within the Act. I respectfully agree with this view, which is, I think, reinforced by the words " under care or treatment " which in the context must mean under care or treatment as a defective within the meaning of the Act. In my view, on proof that a girl is detained as an inmate in one of the specified institutions and under care or treatment therein as a defective or is shown by the production of the licence to be out on licence from one of those places to which the system of licences under the Act is applicable, that is prima facie proof that she is a defective lawfully under care or treatment as such, and I think the Attorney-General—if I correctly understood him as previously stated—was assuming an unnecessary burden if he meant that it is incumbent on the prosecution in all cases under section 56 to satisfy a jury by medical evidence that the girl in question comes within one or other of the categories specified in section 1. I think this is to be presumed. But the foundation for the presumption, in the case of a person under detention or on licence, is the legality of the detention and the necessity for a licence to justify the patient's absence, and if it is shown and admitted, as in the present case, that on the face of the documents produced and received in evidence without objection the detention was illegal, the whole basis of the subsection and the presumption of defectiveness goes and the prosecution must fail. I do not think anything more than what I have stated above is required to establish a prima facie case, but it is right and proper that the prosecution should have in court and make available for inspection by defending counsel the relevant orders or other documents upon which the detention is based so that in a proper case, and subject to questions of admissibility in evidence, the presumption of legality may be rebutted.

My Lords, it remains only to state that I agree with the reasons of the Court of Criminal Appeal for rejecting the Crown's contention that, even if the original order was invalid, it had been cured by the continuation orders and a subsequent reclassification of the girl by the superintendent placing her in a different category of defectiveness coupled with his evidence to the effect that she was at the material date a defective within that category.

For these reasons I would dismiss this appeal.

I desire to add that I have read the opinion about to be delivered by my noble and learned friend Lord Somervell of Harrow and that I agree with the views expressed therein.

Lord Somervell of Harrow—My Lords, I agree with the opinion that has been given by my noble and learned friend Lord Tucker and have nothing I wish to add to it.

I have had the advantage of reading the opinion about to be given by my noble and learned friend Lord Denning and would like briefly to make my reservations. My noble friend thinks that the Secretary of State's order of July 2, 1947, was voidable and not void. I am not satisfied that the order was not void. On the wording of section 9 of the Mental Deficiency Act, 1913, I think the certificates may well be for this purpose part of the order to be looked at in order to see whether it is good on its face. If they are not part of the order, it might, I think, be maintained that they afford no evidence on which the order made could validly have been based. In either case I would wish to reserve the question whether the order would not be void rather than voidable.

It is conceded that the court had material before it which would have led to the order being quashed on certiorari or other appropriate proceedings. The next question, as it appears to me, can be stated in this way. Is a man to be sent to prison on the basis that an order is a good order, when the court knows it would be set aside if proper proceedings were taken? I doubt it. The case was never argued on these lines before the Court of Criminal Appeal. The distinction between void and voidable is by no means a clear one, as a glance at the entry under "void" in Stroud's *Judicial Dictionary* shows. I am not satisfied that the question whether a man should go or not go to prison should depend upon the distinction.

I would dismiss the appeal for the reasons given by my noble and learned friend Lord Tucker.

LORD DENNING—My Lords, the first point is whether it is necessary for the prosecution in such a case as this to prove that the woman was lawfully detained; and if it is necessary, how are they to prove it? The Lord Chief Justice gave this ruling on the point: "So that there may be no doubt on the matter, I desire to say that where a man is prosecuted for this offence, evidence must be given by the production of the relevant documents that the woman in respect of whom the charge is made was at the time of the offence lawfully subject to the Act." The Lord Chief Justice was, I think, only referring to the case of a woman detained under compulsion, not to a voluntary patient. In such a case I think his ruling is correct. The prosecution must prove that the woman is *lawfully* under care or treatment, and they can only do this by proving that she is *lawfully detained*: and they must prove that she is under care or treatment *as a defective*, not for any other illness. But they need not prove that she *is* a defective. Suffice it to prove that she is lawfully detained *as* a defective. That raises a presumption that she is a defective. The accused man is protected from any injustice by the proviso which gives him a defence if "he proves that he did not know and had no reason to suppose" that she was a defective.

So also with a woman "placed out on licence," I think there must be in force a subsisting order for her detention. The medical superintendent cannot grant her a licence to be absent unless he has a right to compel her to stay: and she is only "on licence" so long as there is a right to bring her back: see regulations 95 to 97 of the Mental Deficiency Regulations, 1948, and section 42 of the Mental Deficiency Act, 1913.

The Attorney-General took exception to the ruling of the Lord Chief Justice. He submitted that it was not necessary for the prosecution to prove that the woman was *lawfully detained*. If there were such a burden on the prosecution, he foresaw great difficulty in discharging it. The prosecution would have to call the medical men who examined the woman many years ago when she was first certified as a defective and also evidence that she was "found neglected" or whatever else was the particular ground on which she was "dealt with" under the Act. That would be a burden of such magnitude that the imposing of it would make the section a dead letter.

I do not think the difficulty is nearly so great as the Attorney-General fears. It is only necessary, as the Lord Chief Justice said, to produce the relevant documents. My noble and learned friend Lord Tucker says that it is not necessary even to go as far as that. It is sufficient to prove that the woman detained is an inmate in an institution—under care or treatment as a defective—and then rely on a presumption of legality without giving in evidence any of the relevant documents. I cannot bring myself to go as far as this. It seems to me to offend against a fundamental principle. No one in this country can be detained against his will except under the warrant of lawful authority; and when that warrant is required by law to be in writing, it must be produced on demand to the person detained and to any other person properly concerned to challenge the detention. When the legality of the detention has to be proved in a court of law, the document itself must be produced. It is the best evidence and nothing less will do. In THE QUEEN'S CASE (1820) 2 Brod. & B. 284 at p. 289, Abbott C.J., giving the opinion of the judges to this House, said that it " is a rule of evidence as old as any part of the common law of England that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself and not by parol evidence " : and in STROTHER *v.* BARR (1825) 5 Bing. 136 at p. 151, Best C.J. said that " great writers on the law of evidence say that, if the best evidence be kept back, it raises a suspicion that, if produced, it would falsify the secondary evidence on which the party has rested his case." Whilst I readily acknowledge that that rule has been relaxed in modern times, it has never, so far as I know, been relaxed in the case of orders which deprive a person of his or her liberty. If the order is in existence, it ought to be produced. If it is kept back, it raises a suspicion that there is something wrong with it. In 1802 when a man was committed to the Fleet prison for debt, it was held that, to prove that fact, the original warrant of commitment must be produced, see SALTE *v.* THOMAS (1802) 3 B. & P. 188. And in 1847 when a question arose whether a prisoner in the Bridewell at Abingdon was in lawful custody, Maule J. ruled that the oral evidence of the Governor was not sufficient; nor was the calendar signed by the Clerk of Assize; but it could only be proved by the record of his conviction at the assizes, see *Re* BOURDON (1847) 2 C. & K. 366.

But this would put the prosecution in a great difficulty, says the Attorney-General. The documents do not prove themselves: and it may be next to impossible to prove them strictly. This is a criminal case and the Evidence Act, 1938, does not apply. Mr. Guthrie Jones says there is no such difficulty. It is sufficient to produce the original orders. I agree with him. Consider for a moment how legality would be proved in habeas corpus proceedings. If the woman herself applied for a writ of habeas corpus, it would be sufficient for the medical superintendent of the hospital, in his return to the writ, to set out the order of detention and the continuation orders as a justification for her detention. He would not have to prove those orders by calling the makers of them or by proving the handwriting on them or anything of that sort, see LEONARD WATSON'S CASE (1839) 9 Ad. & El. 731 at pp. 787–796. The production of them would suffice: see GREENE *v.* HOME SECRETARY [1942] A.C. 284. If the orders disclosed on the face of them a ground sufficient in law for her detention, the court would hold her detention to be lawful, see Wilmot's *Opinions on Habeas Corpus*, pp. 106–108 [1]: unless she could show that the orders were forgeries or that there was no evidence on which the orders could be sustained, see the Habeas Corpus Act, 1816, BAILEY'S CASE (1854) 3 El. & Bl. 607; R. *v.* BOARD OF CONTROL, *ex parte* RUTTY [1956] 2 Q.B. 109, at p. 124. It is true, of course, that the procedure in habeas corpus proceedings is far removed from the present. But if the woman herself—seeking to challenge the legality of her detention in the proper way—can only call for *production* of the orders for her detention, it would seem strange if a third person—seeking to challenge the legality in his own interests—could call for strict proof of them.

The solution to the difficulty is, I think, this: the orders prove themselves by production of the originals from the proper custody. They are the modern successors of the old inquisitions in lunacy. The findings and orders made on such inquisitions were always receivable in evidence by the production of the original record from the proper custody without more ado. Lord Hardwicke so ruled in 1742 (see SERGESON *v.* SEALEY, 2 Atk. 412) and Lord Ellenborough in 1811 (see FAULDER *v.* SILK, 3 Camp. 126), and those cases were applied just over 50 years ago in VAN GRUTTEN *v.* FOXWELL [1897] A.C.

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[1] On March 9, 1758, Wilmot J. and other judges gave certain opinions before the House of Lords on the law relating to the writ of habeas corpus.

658 (see HILL *v.* CLIFFORD [1907] 2 Ch. 236 at pp. 244–245). The inquisition in lunacy has now been replaced by an inquiry by a justice of the peace, a Master in Lunacy or other public officer. Just as with the old inquisitions in lunacy, so also with these inquiries into defectiveness of mind. The orders made on them are receivable in evidence on production of the original from the proper custody without further proof except to identify the person who was the subject of the inquiry. The reason why these orders are admissible is because they are in the nature of proceedings *in rem*. They affect the status of the individual and her capacity. They are made by a competent public officer whose duty it is to hold a judicial or quasi-judicial inquiry and to record his findings. If he finds that the woman is a defective, many public servants will be called upon to take action, some to detain her, others to take charge of her property. It is essential to the orderly and just conduct of business that all these public servants—and anyone else concerned with her affairs—should be able to act on the faith of the orders as they stand: and should not be put to the proof of the correctness of the findings therein—a task which would often be impossible after the lapse of time. They are therefore made admissible in evidence against all the world, see Starkie on *Evidence*, 3rd ed. (1842) Vol. I, pp. 307–310.

An interesting parallel is to be found in the orders made by the Home Secretary during the war for the detention of suspected persons. Lord Wright said: " The order made by the Home Secretary in the terms of regulation 18B speaks for itself. It is admissible as a public executive document to show a good cause of the detention and needs no extrinsic justification," see GREENE *v.* HOME SECRETARY [1942] A.C. 284 at p. 306.

Applying this principle, it seems to me that the orders made by a competent authority under the Mental Deficiency Act, 1913, such as the order of a judicial authority under section 6, or of a Secretary of State under section 9, or the continuation orders of the Board of Control under section 11, are admissible in evidence on production of the originals from the proper custody and on identification of the party who is the subject of the order. If the originals are not available, certified copies are often made admissible by statute. Thus, in the case of an order made by a Secretary of State under section 9, a certified copy is admissible under the Documentary Evidence Act, 1868. In the case of the continuation orders, there is no need to produce the originals if the secretary to the Board certifies under section 11 (5) that the initial order has been continued.

What, then, does an order of this kind prove when produced from the public custody? It is conclusive proof of its own existence, that is to say, that an order was made as the document says it was; and it is prima facie evidence (but not conclusive evidence) of the truth of the facts recited in it which are essential to its validity: and if uncontradicted, it ought to be regarded as sufficient evidence of those facts, see HARVEY *v.* R. [1901] A.C. 601 at p. 611; HILL *v.* CLIFFORD [1907] 2 Ch. 236 at pp. 244–5.

The result is that in an ordinary case, in order to show that the woman is lawfully detained as a defective, all that the prosecution have to do is to call the medical superintendent to produce the original order for detention and the continuation orders, and in addition, if the woman has been placed out on licence, to prove that fact. That was done in this case and was held by the judge at the trial, Hinchcliffe J., to be sufficient. But it was upset by the Court of Criminal Appeal on the ground that, looking at the other documents which were also produced —but not proved—Miss Henderson was not lawfully detained at all. This brings me to the second point.

The Court of Criminal Appeal have held that Miss Henderson was unlawfully detained for more than ten years and have severely criticised all those concerned in detaining her. The Attorney-General has challenged this finding. He admitted before your Lordships that the original order for her detention might have been quashed—if the appropriate application had been made for the purpose—but he contended that it stood until it was quashed and accordingly that the continuation orders and the licence were good. He cited Lord Radcliffe for his purpose: "Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get the order quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders," see SMITH *v.* EAST ELLOE R. D. C. [1956] A.C. 736 at pp. 769–770. This contention of the Attorney-General was in effect, though not in terms, a contention that the original order was not absolutely *void*, but only *voidable*: and, as it had not been avoided before the continuation orders were made, these remained good. Even if the original order were quashed today, the continuation orders would still be good. This is a point of the first importance which by itself would justify the Attorney-General in giving his certificate for an appeal to this House. I have thought it right therefore to consider it on principle. But first let me state the relevant facts. These all appear on the documents and this House is in as good a position to determine them as the Court of Criminal Appeal.

Miss Henderson was born on July 6, 1928, in Cumberland and left school at fourteen. She then went out to work but when she was nearly sixteen her mother left home. Some months passed. Her father found that she was beyond his control and brought her before the Juvenile Court as a refractory young person. The court ordered her to be sent to an approved school. She was at an approved school in Somerset for over two years. She then absconded and was brought back by the police. The sister in charge of the school said she was absolutely irresponsible and unfit to be at large. Thereupon the question arose whether she ought not to be sent to an institution for defectives under section 9 of the Mental Deficiency Act, 1913, which says: "Where the Secretary of State is satisfied from the certificate of two duly qualified medical practitioners that any person who is in an approved school . . . is a defective, the Secretary of State may order that

1958
Jan. 15, 16,
March 6

DIRECTOR OF PUBLIC PROSECUTIONS *v.* HEAD

Viscount Simonds, Lord Reid, Lord Tucker, Lord Somervell of Harrow, Lord Denning

he be transferred therefrom and sent to an institution for defectives." On June 10, 1947, she was examined by two medical men, one the certifying medical officer for Somerset, the other a medical practitioner in Bath. Each examined her separately and each certified that he had satisfied himself that she was a moral defective. Then on July 2, 1947, just before she was nineteen the Secretary of State made this order: "Whereas, in pursuance of section 9 of the Mental Deficiency Act, 1913, the above named Freda (properly Elfreda) Henderson has been duly certified to be mentally defective within the meaning of the above mentioned Act as subsequently amended, I hereby order that she be transferred from the school in which she is now detained to the Convent of the Good Shepherd Certified Institution of St. Anne's, Saltash, Cornwall. (Signed) J. Chuter Ede, one of His Majesty's Principal Secretaries of State."

If that order is read with section 9 (as it should be), it means that the Secretary of State was satisfied from the certificate of the two doctors that Miss Henderson was a defective. This reference to the medical certificates means that they are to be read with the order as part of the record, see R. *v.* MEDICAL APPEAL TRIBUNAL, *Ex p.* GILMORE [1957] 1 Q.B. 574 at p. 582. And "satisfied" in the Act means reasonably satisfied. If, on reading the medical certificates, no reasonable person would have been satisfied that she was a defective, the order is liable to be quashed. What do the medical certificates show? Each doctor said he was satisfied that she was a moral defective, but each stated insufficient facts to warrant this conclusion. One doctor referred to "her conduct," the other to "her behaviour" without going into details. One said she needed care and supervision "for her own protection," but he did not go on to say that she needed it for the protection of others. The other said nothing about it. It is this defect which rendered the certificates insufficient. The Secretary of State ought not to have acted on them as they stood. He ought to have referred them back to the doctors for further

1958
Jan. 15, 16,
March 6

DIRECTOR OF PUBLIC PROSECUTIONS *v.* HEAD

Viscount Simonds,
Lord Reid,
Lord Tucker,
Lord Somervell of Harrow,
Lord Denning

consideration. In fairness to the medical men, I would pause to say that it does not follow that their diagnosis was wrong. It is notoriously difficult to describe the characteristics of mental defectiveness. A doctor may well be able to diagnose it by his own observation of the patient's behaviour, but he may not be able to portray her behaviour adequately in words. The trouble with the two certificates may be, therefore, not in a faulty diagnosis, but in the bad expression of their reasons. The rest of the girl's history supports this view. Within a few days of going to the convent in Cornwall, she was found to be of such dangerous or violent propensities that the Board of Control ordered her to be removed to the Moss Side State Institution at Liverpool—a place specially set aside for serious cases of mental defectiveness. Whilst she was there continuation orders were made: and when she became of age, the statutory visitors held the important reconsideration of her case which the law requires. They reported that she was a moral defective and was a proper person to be detained. The statute gives a right of appeal from that decision, but neither she nor her parents appealed. After she had been five years at Moss Side she had improved sufficiently to be sent to an ordinary institution. She was sent eventually to Dovenby Hall. In 1954 when she was twenty-six, the medical superintendent of that hospital, Dr. Ferguson (who gave evidence at the trial), classified her as a " feeble-minded person " rather than a " moral defective," but she was still a defective within the Act, and the Board of Control made a continuation order. By October 31, 1955, she had improved so much that Dr. Ferguson granted her a licence to St. Catherine's College, Keswick. He did this so as to try to rehabilitate her. She worked at that college as one of the domestic staff. It was in 1956, whilst she was still out on licence, that the accused—in spite of explicit warnings—had intercourse with her. In October, 1957, she was discharged. Apparently she was then cured, for shortly afterwards she married another man.

On that history, I ask myself: what effect did the initial mistake have on all that followed? Was it the cause of her detention over the next ten years as the Court of Criminal Appeal seems to have thought? I should have said it was not. The chain of causation was broken at innumerable points just as it was in the celebrated case of **Harnett** *v.* **Bond** [1924] 2 K.B. 517 at pp. 538–542; [1925] A.C. 669 at p. 682. It was certainly broken on every continuation order. Under the statute the original order lasted only for one year and would then have expired unless a continuation order had been made. Before this was made, there had to be special reports on the girl by the statutory visitors and by the medical officer together with a certificate that she was still a proper person to be detained: and it was only after considering them all that the Board of Control made a continuation order. That first continuation order would itself have expired after five years unless another continuation order had been made after another investigation. And so on, from one continuation order to another, she was only detained as a result of an independent decision freshly made after the most careful reconsideration of her case. These continuation orders were not made by automata with a rubber stamp. They were made by responsible people to whom Parliament had entrusted the task. On a just appraisal of the case, these continuation orders cannot be ignored in point of fact, but can they be ignored in point of law?

Mr. Guthrie Jones said that the original order was bad and that therefore the continuation orders were bad. They depended on the original order which was itself void. Nothing could save the continuation orders, he said, if the original order was bad. This contention seems to me to raise the whole question of *void* or *voidable*: for if the original order was void, it would in law be a nullity. There would be no need for an order to quash it. It would be automatically null and void without more ado. The continuation orders would be nullities too, because you cannot continue a nullity. The licence to Miss Henderson would be a nullity. So would all the dealings with her property under section 64. None of the orders would be admissible in evidence. The Secretary of State would, I fancy, be liable in damages for all of the ten years during which she was unlawfully detained, since it could all be said to flow from his negligent act: see section 30 of the Mental Treatment Act, 1930. But if the original order was only voidable, then it would not be automatically void. Something would have to be done to avoid it. There would have to be an application to the High Court for *certiorari* to quash it. The application would have to be made by the person aggrieved—Miss Henderson—and not by a stranger: and she would have to make it within six months unless the court extended the time. And being only voidable, the court would have a discretion whether to quash it or not. It would do so if justice demanded it, but not otherwise. Meanwhile the order would remain good, and a support for all that had been done under it. See the principles discussed in DIMES *v.* GRAND JUNCTION CANAL (1852) 3 H.L.C. 759, at p. 786, MCPHERSON *v.* MCPHERSON [1936] A.C. 177 at pp. 203–205. In this case, therefore, if the original order was only voidable, the continuation orders would be good. So would the licence. All dealings with her property would be valid. All the orders would be admissible in evidence, see LEIGHTON *v.* LEIGHTON (1720) 1 Strange 308, Hubback on *Succession*, pp. 590–591: and the Secretary of State would not be liable in damages, see EVERETT *v.* GRIFFITHS [1921] 1 A.C. 631.

The vital question to my mind is therefore: Was the original order absolutely void or was it only voidable? If the order had been outside the jurisdiction of the Secretary of State altogether, it would have been a nullity and void, see the CASE OF THE MARSHALSEA (1612) 10 Co.Rep. 68b. But that is not this case. The most that appears here is that the Secretary of State—acting within his jurisdiction—exercised that jurisdiction erroneously. That makes his order voidable and not void. It is said that he made the order on no evidence or on insufficient materials. So be it. His error is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not, see R. *v.* NAT BELL LIQUORS LTD. [1922] 2 A.C. 128 at p. 151 by Lord Sumner. If that error appears on the face of the record—as it is said to do here—it renders the order liable to be quashed on certiorari, but it does not make it a nullity, see R. *v.* MEDICAL APPEAL TRIBUNAL, *Ex p.* GILMORE [1957] 1 Q.B. 574 at p. 588 by Parker L.J. Unless and until it is so quashed, it is to be regarded as good. It is moreover sufficient to support all the continuation orders made on the faith of it. Even if the original order should be set aside, the continuation orders would remain good: for it is a general rule that when a voidable transaction is avoided, it does not invalidate intermediate transactions which were made on the basis that it was good, see DE RENEVILLE *v.* DE RENEVILLE [1948] P. 100 at pp. 111–112, by Lord Greene M.R., and ALGAR 37 Cr.App.R. 200; [1954] 1 Q.B. 279 at p. 287 by Lord Goddard C.J. Even if the woman applied for habeas corpus, she would be no better off, because the court, on seeing the continuation orders still standing, would not release her: just as it would not release her if it appeared that there would be danger in setting her at large, see R. *v.* SHUTTLEWORTH (1846) 9 Q.B. 651. I would uphold therefore the contention of the Attorney-General that, whatever the position of the original order, the continuation orders were good.

Another consequence of the order being only voidable is this: that on a charge under section 56 (1) (*a*), there will be no occasion for a trial within a trial—a trial whether the woman could have got the order quashed within a trial of the man for the offence. That would be a very undesirable state of affairs, but it will not arise if the order is to be regarded by the trial court as good, as I think it must, and as, indeed, Hinchcliffe J. ruled in this present case, I think rightly.

It all goes to show how important it is to keep this distinction between void and voidable in mind, especially in the case of mental patients. There are many cases in the books where mistakes have been made by medical men in filling in the certificates leading to detention orders. Sometimes it happens through an oversight, sometimes through carelessness, sometimes through misapprehension as to the legal obligation. Very often it is a highly technical ground, see MURRAY *v.* MURRAY

[1941] P. 1 at pp. 8–9 by Sir Wilfrid Greene M.R. If these orders were on such a ground to be absolutely void it would lead to much injustice in the law of divorce, the law of tort, and so forth: whereas if they are only voidable, there is no such injustice.

It is the failure to keep this distinction in mind which has led to the difficulties in the present case. Instead of considering whether the original order was void or voidable, the Court of Criminal Appeal considered whether it was valid or invalid, and having held it invalid, they held that the woman was unlawfully detained: whereas they should have held it was only voidable, and, not having been avoided, the detention of Miss Henderson at the material time was lawful. In quashing the conviction therefore, they acted on a mistaken ground.

But that is not quite the end of the matter. There is another point. Is it right that the conviction should be restored? The decision of the Court of Criminal Appeal was founded on admissions made by the prosecution. I cannot think that the distinction between void and voidable was made clear to the court. I would not allow the prosecution to clarify it here at the expense of the accused so as to obtain a conviction. But I would allow them to clarify it in the public interest. Once a man has been acquitted by an English court, it is altogether exceptional for the prosecution to be allowed to appeal from the acquittal. Parliament has only allowed it here so as to enable a ruling to be obtained on a point of exceptional public importance. When the Attorney-General comes to this House, seeking for such a ruling, I would myself try to give him an answer: and this I have done. But I would not on this account restore the conviction if it was not fair to do so, having regard to the course of proceedings in the court below.

On this ground I would dismiss the appeal.

Appeal dismissed.

Solicitors: Ludlow, Head & Walter, agents for Milburn & Co., Workington, for the respondent.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE STREATFEILD AND MR. JUSTICE SLADE

1958
Mar. 7

In re HASTINGS

Sentence—Indictment Containing Several Counts—One Sentence Passed—Intention that there should be Concurrent Sentences Plain from Words Used by Judge—Desirability of Clear Words being Used.

Where a prisoner is convicted on several counts of an indictment and it is the intention of the judge that there should be concurrent sentences on each count, it is always desirable that the judge should use the words " concurrent " or " on each count " or other words which make it clear to the prisoner that concurrent sentences are being passed.

Provided that the Court of Criminal Appeal or the Divisional Court can clearly see what was the intention of the judge in passing sentence, the question of the exact words used is immaterial. Thus, where the appellant was convicted on five counts of an indictment, the first count being for larceny [as a bailee], three for obtaining money by false pretences, and the last for fraudulent conversion, and the judge, in sentencing the prisoner, said: " You have been convicted . . . of deliberate, calculated and systematic frauds," categorised the persons who had been victimised by the frauds, and finally said: " You will go to prison for four years' corrective training,"

Held, that it was clearly the intention of the judge to pass concurrent sentences in respect of each count, and, though the conviction on the first count was subsequently quashed, the prisoner was undergoing a lawful sentence in respect of the other counts with which the Divisional Court could not interfere on motion for habeas corpus.

Application for writ of habeas corpus.

The applicant, Edward Thomas Hastings, was tried at Liverpool Crown Court in July, 1957, on an indictment

1958
Mar. 7

In re
HASTINGS

Goddard
L.C.J.,
Streatfeild J.,
Slade J.

containing five counts. The first count was in respect of a felony, larceny [as a bailee], the next three of obtaining money by false pretences, and the last of fraudulent conversion. The applicant pleaded Not Guilty to the whole indictment, but was found guilty on all counts, separate verdicts on each count being returned. After the verdict the Recorder said to him: "You have been convicted on the plainest evidence of deliberate, calculated and systematic frauds. . . . You will go to prison for four years' corrective training." The applicant, having obtained leave to appeal in respect of three of the counts, appealed against the convictions only to the Court of Criminal Appeal, which court, on December 18, 1957, quashed the conviction on the first count and dismissed the appeals in respect of the others. Pearson J., giving the judgment of the court, had said "the actual sentence given was in our view a reasonable sentence and there is no reason for interfering with it" and "there will be no alteration of the sentence."

The applicant was detained in Liverpool Prison in respect of the sentence and obtained leave to apply for a writ of habeas corpus against the Governor on the ground that his detention was illegal by reason of the fact that no valid sentence had been passed on him.

A. P. Marshall, Q.C. (*N. L. Butter* with him), for the applicant. There is no valid sentence in existence under which the applicant is held in prison and the applicant is, accordingly, entitled to be released. The sentence was either a sentence on the first count, which has been subsequently quashed by the Court of Criminal Appeal, or a general sentence invalid *ab initio*: O'CONNELL *v.* R. (1844) 5 St.Tr.(N.S.) 1; 11 Cl. & F. 155. The Court of Criminal Appeal appear to have treated this sentence as if concurrent sentences had been passed on each count, but the Recorder never stated that he was passing concurrent sentences. If there was no valid sentence at all, the Court of Criminal Appeal had no jurisdiction either to vary it or to affirm it.

Rodger Winn (*G. J. Bean* with him), for the Crown. It may be more satisfactory that where a court is passing a sentence which it intends should be concurrent on several counts, the word "concurrent" should be used, but the use of the word is not essential, provided that the court makes it clear what its intention is. Here the language used by the Recorder in passing sentence can be referable only to the intention of imposing concurrent sentences on each count.

THE LORD CHIEF JUSTICE: Mr. Marshall moves in this matter for a writ of habeas corpus to bring up the body of one Edward Thomas Hastings at present detained in Liverpool Gaol where he is serving a sentence of four years' corrective training with a view to his being discharged on the ground that his detention is illegal. The main ground put forward is that no sentence of the court was ever passed upon him.

The circumstances which it is necessary to detail are quite short. He was tried at the Liverpool Crown Court before the learned Recorder of Liverpool, Judge Laski, last July on an indictment containing five counts. The first count was a count for larceny (as a bailee). The second, third and fourth counts were for obtaining money by false pretences, and the fifth count was a count for fraudulent conversion. The jury found him guilty on all counts, and the learned Recorder sentenced him to four years' corrective training, and sentenced him in these words: "You have been convicted on the plainest evidence of deliberate, calculated and systematic frauds"—and I emphasise the use of the plural by the learned Recorder—"Those frauds have not only affected companies well able to sustain loss, but have cruelly brought grave financial burdens on little men which it will be difficult for them to bear. This is by no means the first time you have been convicted of dishonesty. You are a menace to the integrity and health of the commercial community. You will go to prison for four years' corrective training."

The point that is made here is that the sentence of four years' corrective training was duly endorsed on the indictment, but the endorsement did not show four years' corrective training on each of the counts, nor did the learned Recorder use the words " concurrent on each count." Accordingly, Mr. Marshall in the course of a learned and clear argument has submitted that, as the Court of Criminal Appeal subsequently quashed the conviction on count 1, therefore the sentence was passed upon an indictment containing five counts one of which has been quashed, and there is nothing to show to which count the sentence is applicable. He contends that no sentence was passed on any count at all, therefore there has been no legal sentence and there is no authority for holding the applicant in gaol.

In my opinion, the question is simply one of construction. Mr. Marshall agrees that, if the word " concurrent " had been used or if the learned Recorder had said " on each count," he would have no ground on which he could sustain the motion. It seems to me that it is perfectly obvious here that the learned Recorder intended to pass a sentence of four years on each count of the indictment. It is to be noticed that each count of this indictment was for quite a separate and distinct offence. They were not alternative offences, they were separate and distinct offences any of which would support a sentence of four years' corrective training, just as they would support a sentence of four years' imprisonment. One has only to see here that the learned Recorder was dealing with a course of fraud and was saying that he was passing sentence for systematic frauds. Every one of these cases was a case of fraud. It is true that the first case was a felony and the others misdemeanours, but there is no point in that because the four convictions which stood were all convictions for fraud, and of course the first crime, larceny as a bailee, depends upon the fraudulent conversion of the property entrusted to the bailee. If there was a bailment, then by statute the offence of larceny as a bailee can be sustained. I am clearly of opinion that the intention of the learned Recorder was to pass concurrent sentences, although he did not use the word " concurrent." It is not a question of the exact words that are used; it is a question of what the court considers to be the intention of the judge passing the sentence, and one can see that here the learned Recorder meant that on each of the counts a sentence of four years' corrective training was to be passed. That was the view which the Court of Criminal Appeal took when this matter was brought before them, because the point had been raised in the notice of appeal, but the court, in quashing the conviction on count 1, expressly said that they were not making any difference in the sentence because of the gravity of the crimes which had been committed by the applicant and which formed the subject of the other counts. It would follow that if the point Mr. Marshall has strenuously urged upon us is right, it applies equally to what the Court of Criminal Appeal said as to that which Judge Laski said in passing sentence. Pearson J., who gave the judgment of the Court of Criminal Appeal, started his judgment by saying: " In this case the appellant was convicted on five counts involving fraud in the Liverpool Crown Court, and he was sentenced on each count concurrently to a term of corrective training. Leave to appeal was given with regard to three counts only, and leave to appeal was given only in respect of conviction. That, in fact, was all that was asked for, but in any case the actual sentence given was in our view a reasonable sentence and there would be no reason for interfering with it on any view." He said at the end of his judgment: " The conviction on the first count is quashed, in other respects the appeal fails, and there will be no alteration of sentence." In my judgment, the real question we have to decide is: What was the true effect of the learned Recorder's sentence in this case? I think it is abundantly clear that the effect of the Recorder's sentence is that he intended there should be a sentence concurrent on each count. For that reason, therefore, this application fails.

I have only to say one or two more words with regard to the authorities which have been cited to us. Reference was made to the case of O'CONNELL *v.* THE QUEEN (1844) 11 Cl. & F. 155, which came before the House of Lords on a writ of error. In that case there were eleven counts and five counts turned out, in the opinion of the House, to be defective and were

1958
Mar. 7

In re
HASTINGS

Goddard
L.C.J.,
Streatfeild J.,
Slade J.

quashed as bad counts. I do not know that it makes any difference whether they were quashed as bad counts or disposed of by verdict. In those days the way of challenging a criminal conviction was by way of writ of error, and when the writ of error was brought before the House of Lords it appeared that the judgment recorded was "for the offences aforesaid." The majority of their Lordships, contrary to the opinions which the learned judges who had been called upon to assist the House had given, came to the conclusion that there had not been a judgment on all the counts. It is quite obvious from reading the opinions of Lord Denman and Lord Cottenham that they were very much impressed by the inconveniences which they thought could arise in those days, but things are very different now because there is a Court of Criminal Appeal and this matter could be easily brought before the Court of Criminal Appeal. If a case comes before the Court of Criminal Appeal in which a sentence of this sort has been pronounced which the court thinks means concurrent sentences, and if, for instance, in an indictment containing a large number of counts two or three counts are quashed, it is always open then to the court, whether there has been an appeal against sentence or not, to say: "We have quashed the convictions on certain counts. That makes such a difference that we shall reduce the sentence." That is a matter in which the court can exercise its discretion, but there was nothing said in the House of Lords to the effect that a general sentence cannot be given. The only point is that a general sentence in those days did become defective if it was given on many counts some of which were afterwards quashed. I do not propose to go at length into the history of the abolition of writs of error which are no longer available to a prisoner. His privileges are now given to him by the Criminal Appeal Act, 1907, and I see nothing here to force us to say that the learned Recorder in passing the sentence which he did was not passing a sentence on each count of the indictment. Therefore, in my opinion the sentence of four years' corrective training is applicable to counts 2, 3, 4 and 5, and accordingly this motion fails.

There are two things I wish to add. Everybody knows that it is a common thing, whether at assizes or at quarter sessions, for a sentence to be pronounced in this manner, but never since 1844 has an appeal been brought before the court on that ground, although one would suppose that if it was thought that the mere fact that the judge had omitted to use the word " concurrent " made a difference, many prisoners would have tried to escape on that ground. Secondly, this case has perhaps shown that it would always be desirable for the court to use some words such as " on each count," or " concurrent." Although we have no difficulty in holding here that that was the learned Recorder's intention, and we can assume from the use of the plural " frauds " in passing sentence, we think it would be desirable in order to prevent this sort of question arising hereafter to use some such words as those mentioned, but we are not going to upset this sentence merely because one set of words was used rather than another.

STREATFEILD J.: I am of the same opinion, and I want to make it clear that for my part I would certainly uphold the principle which Mr. Marshall has insisted upon, that a court should make it clear that it is in fact passing a sentence in respect of each count on which the accused person has been found Guilty or has pleaded Guilty, and in that respect the judgment of Humphreys J. in GRUBB (1945) 30 Cr.App.R. 148 is very much in point. At the same time, I do not for my part think that any particular form of words is necessary in order to make it clear, provided it is made clear that a sentence which is passed is in fact applicable to each count of an indictment where there has been a finding of guilt. It may be convenient that some such phrase as " upon each count " or " on counts numbers " so-and-so " the sentence shall be " such and such a term. It may be that the word " concurrently " puts that matter beyond all doubt, but provided the meaning is clear in the passing of the sentence and made clear to the accused, no particular form of words is necessary.

In my view, this case narrows down to the one question: what is the proper interpretation of the words which were used by the learned Recorder in passing sentence? I agree with my Lord that the words of the learned Recorder's sentence are really perfectly clear. He is referring to an indictment which contained five counts, one of which was for larceny as a bailee and the others for frauds, three of them being false pretences and the other fraudulent conversion. He refers throughout to those frauds in the plural. He then puts the matter beyond all argument, in my view, by going on to categorise the people who have been victimised by those frauds, and he ends by saying: "You will go to prison for four years' corrective training." It is, to my mind, perfectly obvious that the learned judge was applying his mind to each one of those frauds. Indeed, it would seem that the word "fraud" was more applicable to the last four counts of the indictment than to the first one for larceny, but having regard to the use of the word "frauds" in the plural and having made up his mind, in my judgment, perfectly correctly, that the accused, in view of his record, merited a sentence of corrective training on each count, when he proceeds to pass that sentence of corrective training, the sentence clearly must refer to each and all of those frauds to which he has alluded. In my judgment, therefore, although he has not used the words "upon each count" separately, or the word "concurrently" it is almost too clear for argument that the totality of his words amounts to a sentence by the learned judge of four years' corrective training in respect of each and every one of the five counts of the indictment.

In those circumstances, it seems to me that the remainder of Mr. Marshall's argument does not really arise, and with regard to the case of O'CONNELL (*supra*) in 1844 it would seem likely, without expressing any further opinion upon it, that section 5 of the Crown Cases Act, 1848 (11 & 12 Vict. c. 78), was

1958
Mar. 7

In re HASTINGS

Goddard L.C.J., Streatfeild J., Slade J.

passed with the express purpose of getting rid of the difficulty which arose in that case. Nowadays it would seem that those difficulties can equally well be dealt with by the Court of Criminal Appeal under either section 4 or 5 of the Criminal Appeal Act, 1907. However, having come to the conclusion I have as to the proper interpretation of the learned judge's sentence, those latter matters do not arise and I found my judgment upon what I believe to be the interpretation of the sentence, as I have already indicated. In my view it was the perfectly clear intention that there should be concurrent sentences on each one of the counts. For those reasons, therefore, I agree with the judgment of my Lord.

SLADE J.: I agree. I think the conclusion is almost irresistible from the language used by the learned Recorder, Judge Laski, that his sentence of four years' corrective training was to relate to each of the five counts of the indictment. I am fortified in this view by asking myself the question: if that is not its true interpretation, to which one or more of the five counts did it relate? I have heard the suggestion made, as is the fact, that count one is a felony and counts two to five are misdemeanours, but I cannot help thinking that that suggestion is made solely because the felony was the only count quashed by the Court of Criminal Appeal. The word "frauds" in the plural which preceded the actual sentence is more appropriate to the four counts of misdemeanours than the count of larceny, though it is true in this particular case of larceny by a bailee the words "fraudulently converted" appear in section 1 (1) of the Larceny Act, 1916. I am satisfied that the only possible construction of the words used by the learned Recorder is that he intended to pass a sentence of four years' corrective training on each of the five counts of the indictment.

The court awarded the Crown £10 costs.

Application refused.

Solicitors: Field, Roscoe & Co., for Keith Moore, Birkenhead, for the applicant; Treasury Solicitor, for the Crown.

BEFORE

MR. JUSTICE STREATFEILD, MR. JUSTICE SLADE
AND MR. JUSTICE HAVERS

FREDERICK WILLIAM GARLICK

1958
March 17

Obtaining Credit by Fraud—" Debt "—Illegal Transaction—Credit Sale Agreement in Contravention of Statutory Instrument—Hire-Purchase Agreement—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 13 (1)—*Hire-Purchase and Credit Sale Agreements (Control) Order,* 1957 (*S.I.* 1957, *No.* 430), *art.* 1 (1).

The appellant was convicted on two charges of obtaining credit under false pretences or by means of fraud other than false pretences, contrary to section 13 (1) of the Debtors Act, 1957. The first charge arose out of a credit sale agreement in relation to a bicycle, in which the appellant had used a false name. The terms of the credit sale agreement contravened article 1 (1) of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1957. The second charge arose out of a hire-purchase agreement in the usual form in relation to a bicycle.

Held, that the conviction on both counts must be quashed, as in the first transaction, in view of its illegality, there was no actionable debt, and in the second there had been no obtaining of credit, since the ownership of the bicycle was at the material time in the person who let it out on hire.

LEON, 30 Cr.App.R. 120; [1945] 1 K.B. 136 applied.

Appeal against conviction.

The appellant was convicted at Middlesex Quarter Sessions on December 9, 1957, on two counts of an indictment, each charging him with obtaining credit, contrary to section 13 (1) of the Debtors Act, 1869, and was sentenced by the Chairman (The Hon. E. E. S. Montagu, Q.C.) to ten months' imprisonment.

The first count charged the appellant that, in incurring a debt or liability to Percy Alfred Lewenden, he obtained credit from him for the sum of £24 14s. under false pretences or by means of fraud other than false pretences. The facts in relation to the first count were as follows. On October 17, 1957,

1958
March 17

FREDERICK WILLIAM GARLICK

Streatfeild J., Slade J., Havers J.

the appellant called at a cycle dealer's shop in Ashbourne Parade, Ealing, and saw the proprietor, Mr. Lewenden. The appellant told Mr. Lewenden that his name was Alfred John White of 17 Woodside Avenue, Alperton, and said that he wanted to buy a pedal cycle by easy payments. He agreed to buy a Phillips Cycle of the value of £26 14s. and completed a credit sales agreement in the false name of White. He paid a deposit of £2, and was then allowed to take the cycle away.

The second count charged the appellant with obtaining credit in respect of the sum of £25 17s. 2d. from Joseph William Ram. This charge arose out of a hire-purchase agreement in the usual form in relation to a bicycle, the ownership of which remained in the person who let it out on hire.

Peter Bruce, for the appellant.
Victor Durand, for the Crown.

The arguments appear fully from the judgment.

HAVERS J.: Before the learned chairman of quarter sessions neither counsel raised any question on the documents under which these two transactions were made. Accordingly, the chairman summed up in this way: "The law in this case is quite simple. If anyone obtains credit, or is allowed credit, by fraud or by false pretences, then he has committed an offence. It is common ground here that in each of these cases someone did obtain credit by fraud, credit of the balance of the payments in respect of each of the bicycles. The only question you have to decide is whether it is this man or whether it may have been somebody else." Indeed, the only matter which was in issue before the jury in those circumstances was the question whether the Crown had satisfied the jury that the appellant was the man who entered into each of these transactions. It is right I should say that neither counsel engaged in the appeal before us appeared as counsel at the hearing of the case at the sessions.

This court observed in the notes which were provided from the Registrar's office that there had been a hire-purchase

1958
March 17

FREDERICK WILLIAM GARLICK

Streatfeild J., Slade J., Havers J.

agreement in connection with the second transaction and it was upon that ground that we gave leave to appeal. We had not had an opportunity of seeing that document or the other document, the credit sales agreement, but we thought that, if it was a hire-purchase agreement in the usual form, that raised a very serious doubt whether it could be said that the appellant, in such circumstances, in incurring a debt or liability, obtained credit. Mr. Durand, for the Crown, has quite frankly admitted that it is impossible for him to seek to uphold the conviction on the second count. The hire-purchase agreement was in the usual form, under which the ownership of the bicycle remained in the person who was letting it out on hire, the only obligation on the hirer, that is to say the appellant, being to pay a deposit and then to pay on some specified date each month the amount of hire which became due. He had a right, as hirers usually have under this type of hire-purchase agreement, to terminate the agreement at any time, if he desired to do so, during the period of it. The bicycle did not become his property until the last period of hiring had occurred and he had paid the whole balance, and then he would become the owner on the payment of some small sum. In such circumstances it is impossible to say that the appellant obtained credit.

His conviction on the first count does involve matters which give rise to more difficulty. Mr. Bruce has taken two points, first, that if there was any credit obtained, it was obtained from the T.I. Cycle Credit Facilities, Ltd., and not from the shopkeeper, and secondly that, in any event, this was an illegal transaction inasmuch as it contravened the provisions of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1957. [His Lordship stated the facts as set out above and continued.] In our opinion, the more probable view is that this rather curious document does not purport to be or to create a contract between Cycle Credit Facilities, Ltd., and the appellant, but is merely the machinery devised to enable the finance company, as agents for the shopkeeper, to collect money direct from the purchaser. Whether the contract was made with the shopkeeper or with the finance company, a deposit of £2 only was paid. If the contract was made direct with the proprietor of the shop, then it was a contract not in writing, and that contravenes article 1 (1) of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1957. If, on the other hand, it was a credit sale agreement between the finance company and the appellant, it was equally illegal because it contravened other provisions of that Order. Article 1 (1) of the Order provides: " (1) A person shall not dispose of any goods to which this order applies in pursuance of a hire-purchase or credit sale agreement entered into after the 3rd day of April, 1957 . . . unless the requirements specified in Part I of the Second Schedule hereto are or have been complied with in relation to that agreement." The first is that the agreement shall be in writing, and it is to be observed that this document is not signed by anyone on behalf of Cycle Credit Facilities, Ltd. The second requirement is that " the agreement contains in respect of each description of goods a statement of the cash price of the goods of the description comprised in the agreement and of any amount payable by instalments under the agreement for the installation or maintenance of those goods." The third requirement is that " before the agreement was entered into actual payment was made in respect of each description of goods comprised in the agreement of not less than an amount equal to the percentage specified in column 2 of Part I of the First Schedule hereto in relation to the description of goods of the aggregate of (a) the cash price of the goods of the description comprised in the agreement." To go back to Part I of the First Schedule we find under no. 14 that as regards bicycles and tricycles not mechanically propelled the minimum percentage of the cash price must be 20 per cent. Here the cash price was £22 19s. 8d., and 20 per cent. of that would be just under £4 12s.; only £2 was paid. Thus this credit sale agreement, if made between the finance company and the appellant, was clearly in contravention of the Order of 1957.

This, therefore, is a stronger case than LEON, 30 Cr.App.R. 120; [1945] 1 K.B. 136, a case of a bookmaker. In that case this court held that the word " debt " in section 13 (1) of the

1958
March 17

FREDERICK WILLIAM GARLICK

Streatfeild J., Slade J., Havers J.

Debtors Act, 1869, meant an actionable debt, and that under the Gaming Act, 1845, the transaction was void. In this case, because of a breach of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1957, the transaction was illegal. In these circumstances we think it impossible to uphold the conviction on either count, and the convictions on both counts must be quashed. We do so with considerable reluctance because there was abundant evidence that the appellant was guilty of dishonest and fraudulent conduct.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE STREATFEILD,
MR. JUSTICE SLADE, MR. JUSTICE DONOVAN AND
MR. JUSTICE HAVERS

ALBERT EDWARD MATHESON

1958
Mar. 24;
Apr. 1

Murder — Diminished Responsibility — Uncontradicted Medical Evidence of Abnormality of Mind—Verdict of Guilty of Murder one which "Cannot be Supported having Regard to the Evidence"—Practice—Plea of Guilty to Manslaughter on Ground of Diminished Responsibility not to be Accepted—Duty of Judge with regard to Verdict—Homicide Act, 1957 (5 & 6 *Eliz.* 2, *c.* 11), *s.* 2.

Where on a charge of murder a defence of diminished responsibility is relied on and the medical evidence that diminished responsibility exists is uncontradicted, and the jury return a verdict of Guilty of murder, if there are facts entitling the jury to reject or differ from the opinions of the medical men, the Court of Criminal Appeal will not interfere with the verdict, unless it can be said that the verdict would amount to a miscarriage of justice. There may be cases where evidence of the conduct of the accused before, at the time of and after the killing may be a relevant consideration for the jury in determining this issue. Where, however, there is unchallenged

1958
Mar. 24;
Apr. 1

ALBERT EDWARD MATHESON

Goddard L.C.J.,
Streatfeild J.,
Slade J.,
Donovan J.,
Havers J.

medical evidence of abnormality of mind and consequent substantial impairment of mental responsibility and no facts or circumstances appear which can displace or throw doubt on that evidence, a verdict of Guilty of murder is one which "cannot be supported having regard to the evidence" within the meaning of section 4 (1) of the Criminal Appeal Act, 1907.

Where a defence of diminished responsibility is raised, a plea of Guilty to manslaughter on this ground should not be accepted; the issue must be left to the jury, as in the case of a defence of insanity. Where on an indictment for murder the defence ask for a verdict of Guilty of manslaughter on the ground of diminished responsibility and also on some other ground such as provocation and the jury return a verdict of Guilty of manslaughter, the judge may, and generally should, ask them whether their verdict is based on diminished responsibility or on the other ground or on both.

Appeal against conviction.

The appellant was convicted at Durham Assizes on January 30, 1958, of capital murder and was sentenced by Finnemore J. to death.

The appellant had been associated with a fifteen-year-old boy in a homosexual relationship for which he had almost certainly paid money. On November 18, 1957, the boy not having turned up at some appointment on the previous Saturday, the appellant killed him at the St. James's Hall, Durham, by striking him on the head with a bottle full of water and by many blows with the claw of a hammer. He mutilated and cut up the body and threw it in a sump. In the next few days he wrote the most extraordinary and unkind letters to the boy's mother. He later gave himself up to the police and made a number of statements in one of which he said that he knew the boy had got his wages and that was why he had knocked him off.

Three doctors were called for the defence. The senior prison officer of Durham prison, who had had access to the prison medical records about the appellant back to 1919, described the appellant as early as 1943 as a psychopathic personality and given to self-injury such as swallowing nails and pins. He formed the view that emotionally the appellant was shallow and unstable, a sexual pervert lacking in moral responsibility and of a mental age of less than ten years. He was feeble-minded and a psychopathic personality, and those two things constituted an abnormality of mind which in his opinion substantially impaired his responsibility for the acts he committed. That was also the opinion of a consultant psychiatrist who was also called. A third doctor came to similar conclusions. No evidence to the contrary was called by the prosecution.

The appeal came on for hearing on March 10 before Streatfeild, Slade and Havers JJ. and was adjourned for a full court of five judges.

George Waller, Q.C. (*Peter Taylor* with him), for the appellant. The verdict was unreasonable or cannot be supported having regard to the evidence within the meaning of section 4 (1) of the Criminal Appeal Act, 1907, in (i) not finding that there was diminished responsibility in the case of the appellant and (ii) finding that the killing was committed in course or furtherance of theft. The jury were evidently appalled at the atrocious nature of the crime and did not pay regard to the fact that the evidence was all one way. To substantiate the defence of diminished responsibility under section 2 (1) of the Homicide Act, 1957, the defence must prove that the accused person " was suffering from such abnormality of mind . . . as substantially impaired his mental responsibility for " the killing. No reasonable jury could come to any conclusions other than that the appellant was suffering from such an abnormality of mind.

[THE LORD CHIEF JUSTICE: In diminished responsibility, as in insanity, the onus lies on the defendant. Very often the prosecution call evidence to rebut a suggested defence of insanity. Here, the prosecution called no evidence to displace diminished responsibility. This court seldom interferes with a verdict of a jury, but section 5 (4) of the Criminal Appeal Act, 1907, provides that the court can substitute for

1958
Mar. 24;
Apr. 1

Albert Edward Matheson

Goddard L.C.J., Streatfeild J., Slade J., Donovan J., Havers J.

a verdict of Guilty of murder a verdict of insanity. That same principle applies to diminished responsibility.]

All the medical witnesses agreed that the mental age of the appellant was less than ten. It would be extremely difficult to prove murder against a child of that age, because he is presumed not to have the intentions of an adult person. [He was stopped.]

Peter Stanley-Price, Q.C. (*R. Rawden-Smith* with him), for the Crown. Abnormality of mind is a variable and not a constant condition. The time of the commission of the alleged crime is the material time. The appellant's case really rests on the contention that the verdict of the jury was unreasonable. The basis of the medical evidence was that the abnormality of mind consisted of two ingredients, first, that the appellant was feeble-minded and had the intellect of a boy of ten, and, secondly, that he was a psychopathic personality. It was open to the jury to say that, having regard to the nature of those two ingredients and taking into account the nature of the circumstances of the crime as a whole, that the appellant had not discharged the burden which lay on him of establishing diminished responsibility.

George Waller, Q.C., replied.

The Lord Chief Justice said that the court would allow the appeal and substitute a verdict of manslaughter and a sentence of twenty years' imprisonment. The reasons would be given at a later date.

Cur. adv. vult.

April 1, 1958. The judgment of the court was read by

The Lord Chief Justice: The appellant was convicted at the last Durham Assizes before Finnemore J. of the capital murder of a boy aged fifteen named Gordon Lockhart. The defence was (1) that in killing the boy the appellant was suffering from diminished responsibility as defined by section 2 of the Homicide Act, 1957, and was accordingly Guilty not of murder but of manslaughter, (2) that the murder was not in

1958
Mar. 24;
Apr. 1

ALBERT EDWARD MATHESON

Goddard L.C.J., Streatfeild J., Slade J., Donovan J., Havers J.

the course or furtherance of theft, so that, if the defence of diminished responsibility was not accepted, the murder was not capital. The court at the close of the argument allowed the appeal on the first ground, and substituted a verdict of manslaughter for that of murder. The second ground, therefore, need not be considered and the court gives no decision upon it. We now proceed to give our reasons for allowing the appeal on the first ground.

The murder was of the most horrible description, so revolting as to be almost beyond belief. The appellant, who is fifty-two years of age, was a confirmed practising sodomite, and there was evidence of some association before the murder between him and the boy. The appellant worked as a handyman at St. James's Boxing Hall in Newcastle. On November 18, 1957, the boy went to a new job at a cinema which he left about 4.30 p.m., having previously collected wages due to him from a previous employer. He did not arrive home and was not again seen alive. Two days later his mother received an anonymous postcard saying the boy had gone to London, as a woman was after him for money. A second postcard was received by her the next day saying that Gordon was living in London with prostitutes making money like them and on November 22 a third was received saying "Gordon is dead." All these three cards were written by the appellant. On the evening of the 22nd the police went to the Boxing Hall, and found the boy's body cut in half and stowed in a sump under the hall; it had been disembowelled and the intestines packed into a suitcase. The appellant also wrote anonymously to the Chief Constable of Newcastle saying the body was in the Tyne in sacks and accusing the boy of sodomy. The same day that this letter was received the appellant gave himself up to the police in Glasgow and described how he had killed the boy. All that need be said with regard to his confession is that he described how he had killed the boy by smashing his head, first with a glass bottle which he had filled with water to make it heavier, and then beating it with a claw hammer. This was confirmed by the post-mortem. His other statements alleged that the

1958
Mar. 24;
Apr. 1

ALBERT EDWARD MATHESON

Goddard L.C.J., Streatfeild J., Slade J., Donovan J., Havers J.

boy was demanding £2 from him as the price of buggery and as he, the appellant, was only willing to pay £1, he killed him. There is, of course, only the appellant's word for this accusation. He described how the bottle broke and how he threw the pieces to a place where the police found them. They found the broken bottle with newspaper packed round the neck so that, if it broke, it would not cut the hand that was holding it. He afterwards made further statements saying that he knew the boy would have his week's pay on him and that was why he killed him, but we need not consider this part of the confession, as it would only be material if the court had to consider whether the murder was to be regarded as one in furtherance or in course of theft.

The only issue dealt with on the appeal was that of diminished responsibility; none of the facts were disputed by the appellant. Three medical men were called by the defence, Dr. Pickering, the Senior Medical Officer of Durham Gaol, Dr. Orton, Consultant Psychiatrist at the Newcastle General Hospital, and Dr. Cuthbert, Physician Superintendent at St. Luke's Hospital, Newcastle; all three men of experience in matters relating to mental health. Cross-examination was directed only to the elucidation of some points in their evidence, but the prosecution did not challenge the opinions they had formed and all three had personally examined the appellant. They all agreed that he was not insane within the M'Naughten Rules. Both Dr. Pickering and Dr. Cuthbert said that his mental development was that of a boy of ten. Dr. Orton considered that he was certifiable under the Mental Deficiency Acts, though not under the Lunacy Acts. They were all satisfied that his mind was so abnormal as substantially to impair his mental responsibility. They did not merely repeat the words of the section, but gave the reasons which led them to form this opinion. Thus Dr. Pickering said the appellant's intelligence, measured by certain tests recognised for this purpose, was not more than seventy-three, while that of a normal or average man would be 100, and that his mental condition was due to arrested or retarded development. Dr.

Orton called attention to the records which showed that the appellant had on many occasions swallowed razor-blades and inserted nails in his urethra and, as we have said, was prepared to certify him under the Mental Deficiency Acts. Dr. Cuthbert agreed that his mental development was rather less than what one expects in a child of ten and that he suffered from retarded development. It is unnecessary to set out their evidence in any greater detail. It was clearly enough to shift the burden of proof thrown on the defence by the section, yet no medical evidence was given by the prosecution in rebuttal.

What then were the facts or circumstances which would justify a jury in coming to a conclusion contrary to the unchallenged evidence of these gentlemen? While it has often been emphasised, and we would repeat, that the decision in these cases, as in those in which insanity is pleaded, is for the jury and not for doctors, the verdict must be founded on evidence. If there are facts which would entitle a jury to reject or differ from the opinions of the medical men, this court would not, and indeed could not, disturb their verdict, but if the doctors' evidence is unchallenged and there is no other on this issue, a verdict contrary to their opinion would not be "a true verdict is accordance with the evidence." Here it is said there was evidence of premeditation and undoubtedly there was, but an abnormal mind is as capable of forming an intention and desire to kill as one that is normal; it is just what an abnormal mind might do. A desire to kill is quite common in cases of insanity. We cannot see that the anonymous letters displace the view that the appellant's mind was abnormal or that his responsibility was substantially impaired. They would appear indicative rather of a desire to torture the mother, again a sign of abnormality. The attempts at self-mutilation in a most painful manner are surely acts of a man on the border of insanity and not of a rational person. The revolting nature of the crime itself would cause most people to say it was the work of a maniac, resembling as it did the murders of some seventy years ago which terrorised the East End of London and were known as the "Ripper murders."

1958
Mar. 24;
Apr. 1

ALBERT
EDWARD
MATHESON

Goddard
L.C.J.,
Streatfeild J.,
Slade J.,
Donovan J.,
Havers J.

We can well understand that a jury, faced with such an appalling crime committed by a sodomite, whether from jealousy or because his victim would no longer pander to his vice, would think, as would many, that such a creature ought not to live and that consequently a verdict involving the capital sentence was the only one appropriate. But we have to bear in mind that Parliament has altered the law and decreed that, if a killing is committed by a person whose abnormal mind has seriously diminished his responsibility, the verdict is to be manslaughter and not murder. If then there is unchallenged evidence that there is abnormality of mind and consequent substantial impairment of mental responsibility and no facts or circumstances appear that can displace or throw doubt on that evidence, it seems to the court that we are bound to say that a verdict of murder is unsupported by the evidence. We prefer to rely on those words of section 4 (1) of the Criminal Appeal Act, 1907, rather than on the word "unreasonable." The section directs the court to allow an appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence. Having regard to what we think must have affected the jury or any body of ordinary minded citizens, we should not care to say their verdict was unreasonable, though we feel bound to say it was not supported by the evidence. The fact is that there was unchallenged evidence that the appellant was within the provisions of section 2 of the Homicide Act, 1957, and no evidence that he was not. This decision, therefore, in no way departs from what has been said in other cases that the decision is for the jury and not for the doctors; it only emphasises that a verdict must be supported by evidence. If there is evidence and a proper direction, this court will not usurp the function of the jury, unless indeed there is evidence so overwhelming that the court comes to the conclusion that, though it might be said there was some evidence the other way, the verdict would amount to a miscarriage of justice. We base our decision on the ground that the evidence in this particular case did not support the conviction. But we recognise that there may be cases where, on the issue under section 2 of the Homicide Act, 1957, evidence of the conduct of the accused before, at the time of and after the killing may be relevant considerations for the jury in determining whether the accused has discharged the onus of proving such abnormality of mind as substantially to impair his mental responsibility for his acts.

Before parting with the case, this is a convenient opportunity for laying down a rule of practice in cases where a defence of diminished responsibility is raised. The judges of this court have resolved that a plea of Guilty to manslaughter on this ground should not be accepted, though it seems it may be in Scotland: KIRKWOOD *v.* LORD ADVOCATE, 1939 J.C. 36. The issue must be left to the jury just as the issue must be if the defence is insanity. It may happen that on an indictment for murder the defence may ask for a verdict of manslaughter on the ground of diminished responsibility and also on some other ground such as provocation. If the jury return a verdict of manslaughter, the judge may, and generally should, then ask them whether their verdict is based on diminished responsibility or on the other ground or on both.

Verdict and sentence substituted.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DONOVAN
AND MR. JUSTICE HAVERS

WILLIAM EVANS WALLWORK

1958
April 2

Indictment—Incest—Particulars of Offence—Validity—"In the County of Sussex or elsewhere"—Validity—Indictments Act, 1915 (5 & 6 Geo. 5, c. 90), s. 3, Sched. I, rule 9.

Evidence—Power of Judge to Call Witness—Child of Five—Child Called but no Evidence Given by Her—Evidence of Complaint Admitted.

1958
April 2

WILLIAM EVANS WALLWORK

Goddard L.C.J.,
Donovan J.,
Havers J.

The appellant was charged with incest with his daughter aged five. The Particulars of Offence alleged the offence to have been committed "in the County of Sussex or elsewhere."

Held, that the words naming the place of the alleged offence were surplusage and did not affect the validity of the indictment.

The child was placed in the witness-box by the prosecution, but was unable to give any evidence. Evidence by her grandmother of a complaint made by the child to her, in which she named the appellant as her assailant, was admitted. In opening the case for the defence, defending counsel suggested the possibility of the offence having been committed by the child's step-grandfather who was with the child's grandmother in the grandmother's house after the child had left the appellant and before she was examined by a doctor. The step-grandfather had not been called as a witness by the prosecution, and the judge took the view that he had no power to call him as a witness at that stage of the trial.

Held, (i) that it is most undesirable that a child as young as five should be called as a witness; (ii) that, as the basis of the admission of a recent complaint is that it goes to show the consistency of the complainant's evidence and conduct, such complaint is not admissible where the complainant herself has given no evidence; (iii) that the judge has power, even after the close of the case for the prosecution, himself to call any witness whom he thinks can throw material light on the case.

Appeal against conviction.

The appellant was convicted at Sussex Assizes on December 13, 1957, of incest with his daughter aged five and was sentenced by Paull J. to seven years' imprisonment.

The indictment was in the following terms: "Statement of Offence. Incest, contrary to section 10 (1) of the Sexual Offences Act, 1956. Particulars of Offence: William Evans Wallwork, being a man, on a day unknown between the 7th and the 12th June, 1957, in the County of Sussex or elsewhere, had sexual intercourse with Ann Marie Wallwork, a girl of the age of five years, who is, and whom he then knew to be, his daughter." The girl had been living for some time with her grandmother and step-grandfather at Woking, Surrey. The grandmother was anxious to keep her. On June 8, 1957, the appellant took her away for a holiday, and she slept in his bed at Littlehampton, Sussex on the nights of June 8, 9 and 10. About 6 p.m. on June 11, the appellant returned her to her grandmother. The grandmother stated that the child was then whimpering and that she examined her, and the condition of her private parts showed that there had been serious interference with her. Later in the evening she took the child to her own doctor, who advised her to go to a lady doctor. Just before midnight the lady doctor examined the child and found that her private parts were bleeding and seriously injured. Between the time when the child was returned to the grandmother's house and the time when she was examined by the doctor, the child's step-grandfather had been present in the house. Traces of semen were found on the pyjamas which the appellant had been wearing during the holiday and on the child's knickers.

At the trial the child was placed in the witness-box by the prosecution, but was unable to give any evidence. The child's grandmother gave evidence on a complaint made to her by the child soon after her return in which she named the appellant as her assailant. The child's step-grandfather was not called as a witness. The judge expressed the view that he himself had no power to call a witness after the case for the prosecution had been closed.

Harold Brown, Q.C., and *N. H. Curtis-Raleigh*, for the appellant.

J. H. L. Royle, for the Crown.

The arguments appear fully from the judgment.

THE LORD CHIEF JUSTICE: The appellant was convicted before Paull J. at the Autumn Assizes for Sussex of the offence of incest with his daughter, aged five. He appeals to this court against his conviction, and a variety of points are taken on his behalf. Some of the points, no doubt, raise questions of difficulty; others do not raise any difficulty at all, and I will deal with those first.

A point is taken which, if good, would go to the root of the case, namely, that the indictment was bad on its face. The indictment is in these terms: "Sussex Autumn Assizes. William Evans Wallwork is charged with the following offence:—Statement of offence: Incest, contrary to section 10 (1) of the Sexual Offences Act, 1956. Particulars of offence: William Evans Wallwork, being a man, on a day unknown between the 7th and the 12th June, 1957, in the County of Sussex or elsewhere, had sexual intercourse with Ann Marie Wallwork, a girl of the age of five years who is, and whom he then knew to be, his daughter." The main objection which is taken, as I understand it, is that the words "in the County of Sussex or elsewhere" are inserted, whereas as a general rule one venue alone is inserted. Whatever might have been the law—and I need not go into it—before the Indictments Act, 1915, the matter is now entirely governed by that Act. One of the objects of that Act was to do away with various technicalities which had no bearing on the case and did not cause the prisoner any embarrassment or difficulty. Section 3 of the Indictments Act provides: "Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge." There can be no doubt here that this indictment contains a statement of a specific offence, namely, incest on a day which cannot be exactly named, but a day between the 7th and 12th June. The importance of those dates is that after the 7th, namely, from the 8th to the 11th June the child was in the care and control of the appellant.

The only other point in the Act to which I need call attention is that it is provided in rule 9 of Schedule I: "Subject to any other provisions of these rules, it shall be sufficient to describe any place, time, thing, matter, act, or omission whatsoever to which it is necessary to refer in any indictment, in ordinary language in such a manner as to indicate with reasonable clearness the place, time, thing, matter, act, or omission referred to." So far as place is concerned, I think Mr. Royle's point is a perfectly good one, that incest is an offence wherever it is committed, and it matters not whether it is committed in one place or another, provided the prisoner knows the substance of the charge against him. It makes no difference whether the incest in this case was committed in Sussex or Surrey or any other place. It is not intended by this single count to charge him with more than one offence of incest, and the words " County of Sussex or elsewhere " in the opinion of the court are surplusage. It would have been a perfectly good indictment to charge him with the offence if the words " in the County of Sussex or elsewhere " had been omitted, and there is no pretence for saying that he did not know the nature of the offence with which he was being charged. He had been before the magistrates and committed for trial to the Lewes Assizes. There are cases, as Mr. Royle pointed out, in which it is necessary to indicate a particular place in the indictment, and an illustration which he gave was the offence of larceny on a ship which was at the time of the larceny in a harbour or in a creek or other place of anchorage—I do not use the exact terms of the section—where it would be necessary to show that the theft took place while the ship was in a harbour or some particular creek, and then it would be necessary to mention the name of the harbour or creek. But the rule which I have just read contains the words " to which it is necessary to refer in any indictment " and, in the opinion of the court, it is not necessary to refer to any place in the indictment in an offence of this description. Therefore, that objection fails. We think the indictment is a good one, though those words might well have been omitted, and I think it would be right to omit them if there was no real doubt where the offence took place. I may add that the reason why the venue is good as laid in those words is because it was proved that between the dates mentioned in the count the child had been with her father first at Woking, where he lived, then at Littlehampton where he took her, and then again at Woking where she was returned to her grandmother where she was living at the time. The appellant took her on June 8, and it matters not whether the offence was committed at one place or another so far as the

1958
April 2

WILLIAM EVANS WALLWORK

Goddard L.C.J., Donovan J., Havers J.

charge is concerned. We think that those words "in the County of Sussex or elsewhere" were surplusage.

Before I come to the really material and difficult point in the case, I will deal with two or three other matters which were argued before us. During the course of the trial a question arose when Mr. Curtis-Raleigh, who defended the appellant—and he defended him, let me say at once, with the greatest possible propriety; there is no complaint of any sort against the way in which he conducted the defence—in the course of opening the defence, stated to the jury that he was bound to ask them to consider whether or not the grandmother with whom the child was living was a party to or knew anything about the injury from which the child had suffered. [His Lordship stated the facts, and continued.]

Counsel said that he was bound to suggest that there were other people, namely, the grandmother or the step-grandfather, who might have interfered with the child. Thereupon, the learned judge intervened to say that that had never been put to the grandmother, when she was in the box. It turned out in the end after the shorthand writer was appealed to that Mr. Curtis-Raleigh had put that matter to the grandmother.

Then arose another unfortunate incident. The learned judge seemed to think then that it was highly desirable that the step-grandfather should have been called. The grandmother had given evidence and she had said in the clearest possible terms that the child was never out of her sight from the time when her father brought her back to the time when she took her to the doctor, and that any injury from which the child suffered was not suffered while she was in her care after she was brought back by the appellant, the inference being that any injury she suffered must have been suffered before she was brought back. The grandmother was perfectly clear about that, but the prosecution had not called the step-grandfather, and I suppose if they had realised that this defence was going to be raised or suggested they might have done so. The learned judge took the view, and I think learned counsel took the view, that as the case for the prosecution had been closed, further witnesses

1958
April 2

WILLIAM EVANS WALLWORK

Goddard L.C.J., Donovan J., Havers J.

could not be called for the prosecution, and, in our view, they could not have been called for the prosecution unless after the case for the defence some point had arisen which took the prosecution by surprise, when, according to the decided cases, evidence in rebuttal could have been given. The learned judge took the view that he could not call the witness. With all respect to the learned judge, this court does not take that view. This court takes the view that in a criminal trial—and I emphasise a criminal trial because it is different in civil proceedings—if the presiding judge, whether he is a judge of assize or chairman of quarter sessions, is of opinion that some person ought to be called who can throw material light on the subject, in his discretion he may call him and examine him himself. However, that was not done, but another very long discussion took place partly in the absence and partly in the presence of the jury, and the learned judge did comment on the fact and told the jury that it was perhaps unfortunate that the step-grandfather had not been called and, as he put it, could not now be called. But at the same time the court cannot see that this was a matter prejudicial to the appellant because it enabled the defence to say, as no doubt was said by learned counsel with considerable force: " You have to be satisfied beyond reasonable doubt that this man committed this offence, and there is another person who might have committed the offence, because there is a man who has not been called." Against that the jury would be entitled to weigh up the evidence given by the grandmother that she, a woman anxious to retain the child, had actually had the child under her eye all the time since the child came back with the appellant, and that nothing whatever had happened to the child while she was there in the house. It does strain one's credulity to think that any jury could imagine that the grandmother or the step-grandfather, when the grandmother was in the house, could possibly have been a party to the mutilation of this little creature especially as the one thing about which the grandmother was anxious was to retain custody of the child. We do not think in those circumstances, although it is perhaps

1958
April 2

WILLIAM EVANS WALLWORK

Goddard L.C.J., Donovan J., Havers J.

unfortunate that there were such long discussions either in the presence or absence of the jury, that it was prejudicial to the appellant and therefore we pay no attention to that part of the case.

Then it is said that the learned judge did not fairly put the defence to the jury. On that we cannot see that there is any real ground of complaint at all. The learned judge read long extracts from the evidence both of the prosecution and of the defence, and Mr. Harold Brown's main point is that the learned judge did not say to the jury in terms: "The defendant has always most strenuously denied the offence from the very first." But that was undoubtedly clear to the jury, as the judge read passages to them from the evidence of the police inspector in which the appellant emphatically denied to the police inspector that he had anything to do with the offence, and so it must have been clear to the jury that from the outset the appellant had denied he was guilty of an assault on his daughter or the offence with which he was charged. I have never heard it suggested till today that, because a jury has not been told by a learned judge that a prisoner has denied the matter from the start, that is misdirection, since if a prisoner pleads Not Guilty he is denying the accusation. In the opinion of the court, there is nothing in the point; we think the defence was put to the jury because the defence was: "I have never touched this child, I had nothing to do with her. She was in my custody on those days I mentioned, but I did nothing to her except take her away to Littlehampton except for the one occasion when I put a little grease on her bottom because it was a little sore"—of course a father can do that—"and I did nothing whatever to the child." It must, therefore, have been clear to the jury that the accusation was strenuously denied by the appellant from the start.

We now come to the point which has given the court considerable difficulty. The child was called as a witness, but said nothing. The court deprecates the calling of a child of this age as a witness. Although the learned judge had the court cleared as far as it can be cleared, it seems to us to be

1958
April 2

WILLIAM EVANS WALLWORK

Goddard L.C.J., Donovan J., Havers J.

unfortunate that she was called and, with all respect to the learned judge, I am surprised that he allowed her to be called. The jury could not attach any value to the evidence of a child of five; it is ridiculous to suppose that they could. Of course, the child could not be sworn. There must be corroborative evidence if a child of tender years and too young to understand the nature of an oath is called, but in any circumstances to call a little child of the age of five seems to us to be most undesirable, and I hope it will not occur again. In the course of the case the grandmother, giving evidence, stated in answer to a question that the child made this complaint, and that the child was whimpering. It was after the appellant had left that the child said, according to the grandmother, " Daddy hurt my botty and my privates and made me bleed " and, as I have already said, the child was bleeding when she was taken to the doctor. That evidence was given without objection being taken, but we do not pay any attention to that fact. First, in our opinion, in this particular case that evidence was not admissible. In cases of rape or indecent assault it has always been held that evidence of a complaint and the terms of the complaint may be given, but they may be given only for a particular purpose, not as evidence of the fact complained of, because the fact that the woman says not on oath: " So-and-so assaulted me " cannot be evidence against the prisoner that the assault did take place. The evidence may be and is tendered for the purpose of showing consistency in her conduct and consistency with the evidence she has given in the box. It is material, for instance, where a question of identity is concerned, that she made an immediate complaint or a complaint as soon as she had a reasonable opportunity of making it and made the complaint against the particular man. It is also material, and most material, very often on the point whether the girl or woman was a consenting party. None of these matters arise in this case. The child had given no evidence because when the poor little thing was put into the witness-box, she said nothing and could not remember anything. The learned judge had expressly told the jury to disregard her evidence altogether. Therefore, there was no evidence given by her with regard to which it was necessary to say what she had said to her grandmother was consistent; nor could there be any question of the identity of the prisoner or any question of consent. The learned judge, having once admitted that evidence ought—and he omitted to do this—to have told the jury that it was no evidence of the facts complained of by the child. He not only did not do that, but he also referred to the evidence in his summing-up. In some cases that might be of the very greatest possible importance, but in this particular case let us analyse the matter carefully for a minute. There would have been no objection to the grandmother saying: "The little girl made a complaint to me" and she could have been asked: "In consequence of that complaint what did you do?"—and the answer would have been "I took her to the doctor and later to the police." One realises that, although the terms of the child's statement must not be given, any jury could see at once that as a consequence of the complaint the grandmother took the child to the doctor and the police and that the terms of the complaint would mention her father. So there is really a certain artificiality about this rule that, although the statement which a girl or woman makes in these circumstances is not evidence of the facts complained of, at any rate it shows the jury at the time whether the name of the prisoner is mentioned or is not mentioned, for what happens is that the police go to a particular man and that is because the girl or woman has mentioned the name. Nevertheless, the evidence ought not to have been given and the learned judge ought to have told the jury to disregard it. It was not evidence against the appellant of the facts on which the complaint was founded, and therefore we are bound to say that there was a wrongful admission of evidence in this case.

Now comes the most difficult part of the case and a part which has given the court a great deal of anxiety, and that is whether or not we should apply the proviso. Section 4 (1) of the Criminal Appeal Act, 1907, provides: "Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." We have taken note of Lord Simon's speech in the case of STIRLAND *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 30 Cr.App.R. 40; [1944] A.C. 315, and certain other cases, including HADDY, 29 Cr.App.R. 182; [1944] K.B. 442, which was referred to with approval in the noble Lord's speech, and we have directed ourselves in accordance with the authorities which have been decided, which we took the opportunity of reading so that we might have them in our minds, and we know the principles, therefore, which we are to apply.

In many cases if a piece of inadmissible evidence is given in a sexual case or if the jury do not receive proper direction with regard to a complaint made by a girl mentioning a man's name, it might be a most serious matter, but this case in many respects is different from the ordinary case of this sort. This is no case of a girl or a woman coming to a friend or a policeman and saying: "So-and-so has assaulted me." This is a case of a little child who has been entrusted by her grandmother in whose custody—I do not say legal custody, because we have not heard about that—but, at any rate, in whose care the child was living up to June 8, to her father, and the father was in charge of that child from June 8 to June 11, and no one suggests for one moment that the child's body was in any respect injured or damaged at the time when the child was given to her father on June 8. We know that the child was sleeping in her father's bed, but considering her age that would not of itself call for comment, and that he took her down to Littlehampton and again she slept in his bed there, and that the child was brought back to the house before she returned to her grandmother, and I think a night was spent there. Then the child is found to be suffering in this shocking manner which showed that she had been violated; there is no question about that. How did that happen? Who could have been responsible for that act? It seems to the court that the dilemma is complete. It

1958
April 2

WILLIAM EVANS WALLWORK

Goddard L.C.J., Donovan J., Havers J.

was either the appellant in whose care the child had been from the time when she left the grandmother's house till the time when she was returned to the grandmother or it was the grandmother or someone in the grandmother's house who between six o'clock in the evening when the child was returned and the time she was taken to the doctor committed the offence. That is not all. The most serious evidence and the evidence most prejudicial to the appellant was that not only were the appellant's pyjamas which he was wearing at the time when he was with the child stained with semen, but the child's own knickers which were brought back were found to be stained with semen. The only possible explanation which the appellant gave as to how the child's knickers became stained with semen was that he was subject to nocturnal emissions and must have taken the child's knickers when they were lying about somewhere in the room and wiped himself with them, an explanation which I confess I am not surprised did not convey conviction to anyone.

Accordingly, this court thinks, as I have already emphasised, that the jury could if they had disbelieved the grandmother have refused to convict this man. We cannot think that the mere fact that the grandmother gave evidence that the child mentioned the appellant's name could really have had any effect on the jury at all or that the position would have been different if the name had not been mentioned, when it was shown that, as soon as the child made a complaint, her grandmother took her straight to the doctor and then to the police and the police went straight to the appellant. The grandmother was obviously very much attached to her little granddaughter and wanted to keep her. It seems to the court that it is impossible to conceive for a moment that she could have been guilty of mutilating this child in the manner described with some instrument. There is no real suggestion that could be made against the old step-grandfather who did not appear in the case. It was perhaps unfortunate that the prosecution did not call him, because it gave a handle to the defence to say that a person who might conceivably have had

1958
April 2

WILLIAM EVANS WALLWORK

Goddard L.C.J., Donovan J., Havers J.

something to do with this case had not been called, but there was the grandmother's evidence that the child had never left her sight from the time when she was brought there to the time when she was taken to the doctor.

For these reasons the court is of the opinion that the points raised show that there were irregularities, but we dismiss the appeal because we are convinced that no substantial miscarriage of justice was caused.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY
AND MR. JUSTICE DONOVAN

LESLIE PERCY MAYTUM-WHITE

1957
Oct. 2

False Pretences — Postdated Cheque — No Account at Bank — Whether Pretence by Drawer of "Full Power and Authority to Draw"—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 32 (1).

The appellant purchased from A.D. some theatre tickets and paid by cheque. The cheque was postdated by two days. He had no account at the bank concerned and in due course the cheque was dishonoured. The appellant was indicted for obtaining the tickets by falsely pretending, *inter alia,* "that he then had full power and authority to draw a cheque upon a certain bank. . . ." He was convicted and appealed on the ground that the postdated cheque was only a representation as to the future, in that it *would* be a good and valid order, and that he *would* have full power and authority to draw on the bank, on the due date.

Held, dismissing the appeal, a postdated cheque is a representation that the drawer is a customer of the bank concerned and, as only customers of a bank have authority to draw cheques, the drawer represents that he has power and authority to draw on the bank, but not for any particular amount.

1957
Oct. 2

LESLIE PERCY MAYTUM-WHITE

Goddard L.C.J., Hilbery J., Dovonan J.

Appeal against conviction.

The appellant was convicted at the County of London Sessions on May 15, 1957, of obtaining four theatre tickets by false pretences, contrary to section 32 (1) of the Larceny Act, 1916, and was sentenced to nine months' imprisonment.

The indictment alleged that the appellant ". . . on the 1st day of November, 1956, . . . with intent to defraud obtained from A.D. and the D. theatre, four theatre tickets by falsely pretending that a certain piece of paper writing which he then produced and delivered to the said A.D. was then a good and valid order for the payment of £8. 8. 0.; that he then had full power and authority to draw a cheque upon a certain bank, to wit, Williams Deacons Bank situate at . . .".

On November 1, 1956, the appellant purchased from A.D. four theatre tickets. He paid by a cheque for £8. 8. 0., drawn on Williams Deacons Bank. The cheque was dated November 3, 1956. Nothing was said at the time about postdating, but the evidence was that there had been no concealment of the date on the cheque by the appellant. The appellant in fact had no account at that bank on November 1, 1956, or on November 3, and when the cheque was presented for payment after November 3, 1956, it was dishonoured.

M. D. L. Worsley, for the appellant.

A postdated cheque is only a representation that it *will be* a good and valid order, and that the drawer *will have* full power and authority to draw on the due date. Even if it is a representation that the drawer has an account, that pretence was not laid. WALNE (1870) 11 Cox 647, is helpful, but the pretences laid are not reported. See also PARKER (1837) 2 Moo.C.C. 1. In the Canadian appeal case of ALANIE (1941) 76 Can.C.C. 373, the court held that a postdated cheque is not a representation of any present fact.

O. S. Macleay, for the Crown, was not called on to argue.

THE LORD CHIEF JUSTICE: This is an appeal which Mr. Worsley has argued very well and has called attention to the cases for and against him, but which really raises only a very short point.

The appellant, who had no account at all at the bank concerned, asked the producer of a ballet or some performance which he was very anxious to see for four tickets for which he said he was willing to pay. If he was not on the free list, he would not have got the tickets unless he had offered to pay for them, and the appellant said he intended to pay for them. He got the tickets and drew a cheque on Williams Deacons Bank. He had no account at that bank and never had, and so naturally when the cheque was presented it was returned marked "No account." The question is whether or not that is a false pretence and whether it is a false pretence sufficiently alleged in the indictment. It is true that the appellant postdated his cheque on November 1 to November 3, but the indictment alleges that he pretended "that a certain piece of paper writing . . . was then a good and valid order for the payment of eight guineas"; that he then "had full power and authority to draw a cheque upon a certain bank, to wit, Williams Deacons Bank situate at 29, Old Brompton Road, S.W.7." He had written the cheque out on a blank cheque form which some shopkeepers will provide for their customers and put a twopenny stamp on it. He had written out this cheque to Williams Deacons Bank, 29, Old Brompton Road, S.W.7. That, surely, is a representation that he has an account with Williams Deacons Bank. It is not necessarily a representation that he has eight guineas in the bank, but it is at least a representation that he is a customer of Williams Deacons Bank, and only customers of banks have authority to draw cheques on banks. Therefore he was, by drawing the cheque, representing that he had power and authority to draw a cheque on the bank, but was not representing that he had power to draw a particular amount. Surely there is all the difference in the world between a man giving a cheque on a bank in which he has no account and giving a cheque on a bank where he is a customer, though it is for too much. If he gives a cheque on his own bank and gives it in

1957
Oct. 2

LESLIE PERCY MAYTUM-WHITE

Goddard L.C.J., Hilbery J., Dovonan J.

excess of the amount of credit which he has in the bank, there must be evidence that he knew he had not enough money in the bank. Here it was proved that he was not a customer of the bank. Therefore, he had no power or authority to draw a cheque, but was representing by giving the cheque that he was a customer of Williams Deacons Bank, Old Brompton Road S.W.7.

In spite of the argument and cases cited, the case is quite clear, in my opinion, and this appeal must be dismissed. If a man gives a postdated cheque, it means that the cheque will be paid on the date on which the cheque is presented, though it does not mean that the drawer has immediately got the money in the bank. The only point in the case is that by giving a cheque on Williams Deacons Bank, Old Brompton Road S.W.7., he was representing that he was a customer of that bank. That is what he represented, and he was not. In other words, the false pretence laid in the indictment was proved.

Appeal dismissed.

Solicitors: The Solicitor, Metropolitan Police, for the Crown. [The Editor is indebted to M. D. L. Worsley, Esq., for the preparation of this report.]

CIRCUIT CASE
[MIDLAND CIRCUIT]

BEFORE

MR. JUSTICE PAULL

1958
Jan. 31

R. *v.* POTTER AND ANOTHER

False Pretences—Intent to Defraud—Procuring Delivery of Chattel—Certificate of Competence to Drive—Impersonation of Brother at Driving Test—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 32 (1).

1958
Jan. 31

R. *v.* POTTER AND ANOTHER

Paull J.

Forgery—False Document—Intent to Defraud—Signature on Driving Certificate—Signature in Driving Examiner's Journal—Forgery Act, 1913 (3 *&* 4 *Geo.* 5, *c.* 27), *s.* 1—*Criminal Justice Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 86), *s.* 35 (1).

The defendants W. and A. were brothers, W. being a qualified driver of motor-vehicles and A. holding only a provisional licence. A. made an appointment to take his driving test on July 15, 1957, and received an appointment card. As the result of an agreement between the two brothers that W. should impersonate A. at the test, W. presented himself for the test, produced A.'s card and signed the driving examiner's journal in the name of A. After he had taken and passed the test, he signed in A.'s name the certificate of competence supplied to him by the examiner, and later handed this to A. A. presented to the local authority a completed application for a driving licence, accompanied by this certificate and the appropriate fee, and thus obtained a driving licence. Both defendants pleaded Guilty to a count in an indictment (the validity of which count was not in dispute) charging them with conspiring to procure the issue to W. of a driving certificate in the name of A. by means of W. impersonating A. during the driving test.

Held, that both defendants were guilty also on further counts in the indictment which charged (i) W. with procuring the driving certificate to be issued to A. for the use and benefit of A. by false pretences, contrary to s. 32 (1) of the Larceny Act, 1916, and A. as accessory before the fact to this offence, since the driving certificate was a " chattel " within the meaning of the subsection and there was an intent to induce a course of conduct, namely to induce the local authority to grant a driving licence, by means of the deceit practised (BASSEY (1931) 22 Cr.App.R. 160, applied); (ii) similar offences of procuring the driving licence to be issued to A.; (iii) W. with forging the entry in the examiner's journal purporting to contain A.'s signature; (iv) W. with similarly forging the entry in the driving certificate; (v) A. with uttering the forged driving certificate, as when W. signed the examiner's journal and the driving certificate, he made, in each case, a false document with intent to defraud.

Trial on indictment at Leicester Assizes before Paull J. and a jury.

The defendants, Alan Frederick Potter and William Potter, who were brothers, were charged on an indictment containing six counts. The first three counts charged both defendants, the fourth and fifth William only, and the sixth Alan only. The first count charged them that on a day unknown between July 1 and 15, 1957, they conspired together to procure the issue to William in the name of Alan of a certificate of competence to drive certain groups of motor-vehicles by means of William impersonating Alan during the test of competence to drive held under the Road Traffic Act, 1934. The second count charged William that on July 15, 1957 (the date of the test), by falsely pretending that William was Alan, with intent to defraud he procured to be delivered to Alan for the use of Alan a certificate certifying that Alan had been examined and had passed the test. Alan was charged with aiding and abetting this offence. The third count charged William that on September 11, 1957, by falsely pretending that a certificate certifying that Alan had been examined and had passed the test was a valid certificate and properly issued to Alan, with intent to defraud, he procured to be delivered to Alan for his use and benefit a licence to drive certain motor-vehicles. Alan was charged with aiding and abetting this offence. The fourth count charged William that on July 15, 1957, with intent to defraud he forged an entry in a certain document, namely a driving examiner's journal, purporting to contain the signature of Alan. The fifth count charged William with a similar offence in relation to a certificate of competence to drive. The sixth count charged Alan with uttering the certificate of competence to drive, knowing it to be forged and with intent to defraud.

The following facts appeared from the depositions and were not in dispute. William, who was 23, was a qualified driver. Alan, who was 20, held only a provisional driving licence. Alan made an appointment to take his driving test on July 15, 1957, and received an appointment card. On July 14, both defendants agreed that William should impersonate Alan at the test, and Alan handed to William his appointment card. On July 15, William presented himself to the driving examiner, produced the card and said that he was Alan. On being asked to sign the driving examiner's journal, he did so in the name of Alan. After William had taken and passed the test the examiner wrote out a certificate, which was in a statutory form, certifying that Alan had been examined and had passed the test. The examiner asked William to sign the certificate, and he signed it in the name of Alan and later handed Alan the certificate. On September 11, 1957, Alan went to the Motor Taxation Office in Leicester, presented an application for a licence to drive, together with the driving certificate and a fee of £1, and received a licence to drive vehicles of a certain group.

Both defendants pleaded Guilty to count one, but Not Guilty to all the other counts on which they were charged. Paull J. was prepared to accept the pleas, but counsel for the prosecution stated that the prosecution was very anxious to obtain a decision whether counts 2, 3, 4, 5 and 6 were good in law. The defence contended that on the admitted facts none of these counts disclosed any offence known to the law. Counsel for the prosecution stated that, if the points of law were decided in favour of the defence, he would not proceed on counts 2 to 6 (inclusive). Both defendants were prepared to accept the facts appearing in the depositions as if they had been proved in evidence at the trial.

J. A. Grieves, for the Crown.

E. M. Ling Mallison, for the defendant Alan Frederick Potter.

A. J. H. Morrison, for the defendant William Potter.

PAULL J. [after stating the facts:] It, therefore, falls to me now to decide the points of law raised, and I shall do that by taking each of the counts, other than count 1 to which the defendants pleaded Guilty, and I shall consider the points which have been raised before me in regard to each count.

In count 2 the statement of offence is "Procuring a certificate to be delivered by false pretences, contrary to section 32 (1) of the Larceny Act, 1916." Section 32 of that Act reads "Every person who by any false pretence—(1) with intent to defraud, obtains from any other person any chattel, money or valuable security, or causes or procures any money to be paid, or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person . . . shall be guilty [of a misdemeanour]." Counsel for the defendant submitted that, before a person could be convicted under section 32 (1), it was necessary for him to obtain the chattel, money or valuable security. Counsel referred me to KILHAM (1870) L.R. 1 C.C.R. 261, in which it was held that the word "obtain" did not cover the case, if all that the prisoner did was to obtain the loan of the property. Counsel for the prosecution, however, pointed out to me that the second half of section 32 (1) makes the offence proved if the prisoner "procures . . . any chattel . . . to be delivered to [him] . . . for the use or benefit . . . of himself . . ." He also pointed out that in CHAPMAN (1910) 4 Cr.App.R. 276 it was held that a person could be indicted for obtaining a railway ticket by false pretences, although normally the railway ticket would be returned to the railway company at the end of the journey. The point raised by counsel for the defence is not, in my opinion, a good one. To begin with, in so far as it is for me to draw any inference of fact, the only inference which could be drawn from the fact that the examiner handed over the certificate to William Potter on July 15, was that at that moment William Potter could do what he pleased with the certificate. If he desired to obtain a driving licence, he had to present the certificate to the authorities before they would issue a licence; but, as I see it, there would be nothing against William Potter, having obtained that certificate, putting it on the fire. True he would not have got his driving licence, but circumstances may alter, and he might have changed his mind. I am, however, quite satisfied that, whether that inference of fact be true or not, this case comes within section 32 of the Larceny Act, 1916, because William Potter procured a chattel to be delivered to him, the chattel being the piece of paper on which appeared these words: "Mr. Alan Frederick Potter has been examined and has passed the test of competence to drive Group A," and he obtained it for the use or benefit of himself in the sense that he desired that piece of paper in order to hand it over to his brother. Indeed, the section says ". . . for use or benefit . . . of himself or any other person." William Potter well knew when he obtained that certificate that the intention of Alan Potter was to use it as though it were a certificate obtained by Alan. I hold that the point taken by the defence fails.

The second point taken by the defence is this. Counsel submitted that it could not be said that there was an intent to defraud, because nothing of any value was obtained by the deceit which was practised and nothing was done which turned the deceit into an intent to defraud. I am content, so far as that is concerned, to rely on the words of Swift J., who delivered the judgment of the Court of Criminal Appeal in BASSEY (1931) 22 Cr.App.R. 160. In that case the appellant had induced the Benchers of the Inner Temple to admit him as a student by furnishing the Treasury Office with forged documents, and the point was taken that the words " intent to defraud " were not fulfilled in such a case. Swift J. said (at p. 162): " It was argued on behalf of the appellant that, as the Benchers had lost no money by his act, there was no evidence of any intent to defraud. It was contended that there was at most evidence of an intent to deceive. The distinction between the two intents was mentioned by Buckley J. in *Re* LONDON AND GLOBE FINANCE CORPORATION LTD. [1903] 1 Ch. 728, at p. 732: ' To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.' In this case there was, in the opinion of this court, evidence on which the jury might properly say that, in making these forged documents and in subsequently uttering them, the appellant intended to defraud, because he intended to induce the Benchers to act to their injury in admitting as a student a person whom, if they had known the true facts, it was not only their right, but also their duty to exclude." Those words can, in my opinion, be applied to the present case. There was an intention here of using this document, which was obtained by William Potter pretending that he was Alan Frederick Potter, in order that Alan Potter might obtain a driving licence. It was to induce the county council to take a course of action which they would not otherwise have taken and which it was not only their right, but their duty, not to take if they had known the true facts. Moreover, if one may state another ground, the intent was to induce the county council to part with a chattel, to wit, a piece of paper (the driving licence) on which there was certain printing and certain statements, and I cannot see why that piece of paper is not quite sufficient to form a basis of this charge. The county council were induced to hand it over so that it became the property of Alan Frederick Potter. I hold that count two is a good count in law on the facts which are admitted in this case. I should add that count two charges both defendants, the allegation against Alan Potter being that he was an accessory before the fact. He took the necessary steps of handing over the appointment card to William Potter so that William might produce the card to the examiner who was going to test the driving, and Alan gave that card to William for the express purpose of William deceiving the examiner. That seems to me to be a perfectly good allegation, and as Alan would be an accessory before the fact, he may, under section 35 of the Larceny Act, 1916, be charged as a principal.

Now we come to count three, which charges the procuring of the licence to drive. Precisely the same points were taken on that count as on count two. As I find that those points fail, count three, in my judgment, is a good count,

Count five, which again relates to the driving certificate, charges William Potter only, and is laid under section 4 (1) of the Forgery Act, 1913. That subsection provides: " Forgery of any document, which is not made felony under this or any other statute for the time being in force, if committed with intent to defraud, shall be a misdemeanour. . . ." I have held that there was here an intent to defraud, so the only other question is: was this a forgery? Counsel for the defence submitted that is was not a forgery because it does not come under section 1 of the Act of 1913. The opening words of section 1 (1) are: "For the purposes of this Act, forgery is the making of a false document in order that it may be used as genuine. . . ." Was this then the making of a false document? Section 1 (2) sets out certain cases in which the document is to be deemed to be false. It starts with the words: "A document is false within the meaning of this Act if . . ." and then it sets out different requirements. If I were confined to section 1 (2), I should not find that this driving certificate was a forgery, because I do not think that it comes within any of the provisions of the subsection, but section 35 (1) of the Criminal Justice Act, 1925, provides: "For the purpose of removing doubts, it is hereby declared that a document may be a false document for the purposes of the Forgery Act, 1913, notwithstanding that it is not false in any such manner as is described in subsection (2) of section one of that Act." I am, therefore, not limited to the cases set out in section 1 (2) of the Act of 1913, and I have to ask myself the simple question: was the driving certificate made a false document when William Potter put on the piece of paper the signature which represented the signature of his brother? It is necessary to look a little carefully at that document. It is made under the Road Traffic Acts, 1930 to 1947, and is clearly issued by the county council in order that they may see that, before a driving licence is issued, the person to whom the licence is issued has duly passed his test for driving a motor-vehicle. It is described as a certificate of passing a test of competence to drive. It came into existence after the driving test had been held. After a person has passed the driving test, the examiner fills in the name of the person and the group of vehicles for which the person was tested and the examiner signs his name. This certificate was filled in with the name of Mr. Alan Frederick Potter, and the address 98, Tudor Road, Leicester. There is no doubt that when the examiner passed that document over to William Potter, he thought that he was passing it over to Alan Frederick Potter, and William Potter well knew that that was what the examiner thought. William Potter well knew that he was at that moment falsely pretending that he was his brother Alan Potter. On the back of the document are the words: "This is not a licence to drive. Do not lose this certificate, which must be taken or sent to your county or county borough council with your application for a driving licence. If you lose this form, a duplicate may be obtained from the supervising examiner of your traffic area on giving four days' notice and payment of 1s. The successful candidate must duly sign this form below in ink or in indelible pencil in the presence of the examiner who carried out the test."

There is no dispute in this case that William Potter well knew when he was putting the signature of "A. F. Potter" on that document that he was purporting to put it in the pretence of himself being Alan Frederick Potter. It was necessary for him to sign it in the presence of the examiner. He did so and deceived the examiner. He made it possible for his brother to take the document to the authority and obtain a driving licence. He made it possible, therefore, for his brother to deceive the authority into thinking that he, Alan Frederick Potter, had passed the test. I ask myself the simple question: When William Potter put that signature on that document was it then a genuine document or a false document? I hold that it was a false document, because it was falsely filled in by William Potter, who knew that he had no right to fill it in and that, in filling it in with the name of A. F. Potter he was doing something to deceive, and that he did that with intent that his brother should defraud. I hold, therefore that there was an offence of forgery, because there was the making of a false document. That being so, count five is in my judgment, a good count.

So far as count four is concerned, it seems to me that the entry in the examiner's journal was equally false and for the same reasons.

Count six charges Alan Frederick Potter with uttering a forged document, the forged document being the certificate with which I have dealt under count five. There is no doubt that he uttered it by handing it across the counter to an official on the other side, well knowing that it was forged.

In my judgment, all these counts are good counts in law on the assumption that the facts in the depositions are true.

[Both defendants then withdrew their pleas and pleaded Guilty to all the counts in which they were charged.]

Sentence: Fine of £25 in the case of each defendant.

Solicitors: Chapman and Goddard, Leicester, for the Crown; Herbert Simpson, Son & Bennett, Leicester, for the defendant A. F. Potter; Sawday, Wright and Co., Leicester, for the defendant Wm. Potter.

BEFORE

MR. JUSTICE STREATFEILD, MR. JUSTICE SLADE AND MR. JUSTICE HAVERS

ALBERT VICTOR GORDON
THOMAS SPENCER

1958
Mar. 10, 11,
12, 13, 14,
17, 18

Evidence—Shipping—Homeward Bills of Lading—Admissibility.

The appellants were convicted of, *inter alia*, conspiring to steal cotton from Liverpool Docks. The case for the prosecution was that the appellants had participated in a scheme whereby cotton was stolen from the docks in the course of the off-loading of twelve different ships and subsequently sold through a cotton merchant. The prosecution sought to prove the arrival and off-loading of the cotton at the docks by means of homeward bills of lading produced by employees in the offices of the shipping lines concerned, which showed the number of bales

1958
Mar. 10, 11, 12, 13, 14, 17, 18

ALBERT VICTOR GORDON, THOMAS SPENCER

Streatfeild J., Slade J., Havers J.

of cotton alleged to have been shipped and also their geographical origin. At the trial the judge held that the bills of lading were admissible in evidence.

Held, that the ruling of the judge was wrong and that the bills of lading should not have been admitted in evidence.

Appeals against conviction.

The appellants were convicted at Liverpool Crown Court, on November 13, 1957, the appellant Gordon of conspiracy to steal and larceny, and the appellant Spencer of conspiracy to steal and receiving, and were sentenced by Judge Laski, the appellant Gordon to four years' imprisonment and the appellant Spencer to three years' imprisonment.

The case for the prosecution was that the appellants had organised or taken part in a scheme whereby cotton was stolen from Liverpool Docks in the course of the off-loading of twelve different ships and was subsequently sold through a cotton merchant (who had acted in good faith). The prosecution sought to prove the arrival of the cotton and the off-loading at the docks by means of bills of lading produced by employees in the offices of the shipping lines concerned. All the bills of lading were homeward bills, and showed the number of bales of cotton alleged to have been shipped and also their geographical origin. In their endeavour to prove the departure of the cotton from the docks the prosecution did not call the "checkers," *i.e.*, the employees who themselves supervised the loading of the bales into the consignees' lorries, but called instead the "counters-off," *i.e.*, employees who received information from the checkers with regard to the cotton loaded onto the consignees' lorries. At the trial defending counsel objected to the admissibility of both classes of evidence, but Judge Laski held that they were admissible. He gave a certificate for appeal on the grounds whether he was right in overruling submissions on the part of the defence (i) that certain bills of lading produced by witnesses called for the prosecution were inadmissible in law and (ii) that at the close of the case for the prosecution there was no case to go to the jury.

1958
Mar. 10, 11,
12, 13, 14,
17, 18

ALBERT
VICTOR
GORDON,
THOMAS
SPENCER

Streatfeild J.,
Slade J.,
Havers J.

R. M. Montgomery, for the appellant Gordon.
Gerald Wright, for the appellant Spencer.
G. W. Guthrie Jones, for the Crown.

SLADE J.: The alleged conspiracies involved no fewer than 442 bales of cotton. The stolen cotton was said to be of a value of no less than £27,000. It was alleged to have been stolen from the off-loading of some twelve different ships and it involved at least five, if not six, different varieties of cotton, for example, Peruvian, American, Indian, Sudanese and Brazilian. The case against the appellants and two other defendants who were acquitted was that from early in March, 1956, they organised or took part in a scheme whereby cotton was stolen from Liverpool Docks and was subsequently sold by them or one of them through a cotton merchant on the Liverpool Cotton Exchange, against whose integrity no word was alleged. The prosecution sought to prove their case, first, by proving the arrival of the cotton at Liverpool Docks by means of bills of lading in respect of the various shipments by calling employees in the offices of the shipping lines concerned or their agents, merely to produce the bills of lading and read from them what they contained.* For the purposes of the prosecution the two material contents of the bills of lading were: (i) the number of bales alleged to have been shipped and (ii) the variety of the cotton of which the bales were composed, that is to say, its geographical origin. Objection was taken by counsel for all the defendants to the admissibility of that evidence for that purpose or indeed for any purpose. The prosecution next sought to show, by reference to the disposal of the cotton which had in fact been landed among the various consignees who were entitled to it in whole or in part and by proving that there was insufficient to meet

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* NOTE.—The attention of the court was not directed to the Carriage of Goods by Sea Act, 1924, Art. III (4) of the Schedule to which provides that a bill of lading shall be prima facie evidence of the receipt of the goods by the carrier. Though this provision presumably applies to criminal as well as to civil cases, it was not directly in issue in the present case, as by s. 1 the Act applies only to *outward* bills of lading, and the bills of lading in the present case were all homeward bills.

1958
Mar. 10, 11,
12, 13, 14,
17, 18

ALBERT VICTOR GORDON, THOMAS SPENCER

Streatfeild J., Slade J., Havers J.

the requirements of those consignees, that there was a shortage or deficiency. They then showed by admissible evidence that within a short space of time from the arrival of the particular ship from which the deficiency was alleged to have been proved precisely or substantially the same quantity of cotton of the same type was sold to the merchant. The purpose of that was, of course, to invite the jury to come to the conclusion that there was a limit to which the long arm of coincidence could be stretched. In effect they said to the jury by that evidence: "Lo and behold, here you find ships arriving at the Liverpool Docks, each with a cargo of cotton. Look at the bills of lading. One says 'X bales,' another 'Y bales,' and a third 'Z bales.' Add them together and you get 'X+Y+Z' bales. The bills of lading also describe those X, Y and Z bales as being Sudanese or Brazilian cotton. X+Y+Z bales of that type of cotton have therefore been off-loaded onto the quay." When they were on the quay, the evidence showed that this was the procedure which was adopted. A lorry driver, presumably authorised by one of the consignees of the cotton, would drive his lorry empty to the quays. Without (so far as the evidence goes) any document being produced, but purporting to act on behalf of one of the consignees, he presents himself at the docks after, we will say, the arrival of the first ship named in these counts and asks for a certain number of bales of cotton, no variety being specified. He makes that request of a person called a counter-off. The counter-off details another person, called a checker, to supervise the loading of the appropriate number of bales onto that lorry. The checker, whilst supervising the loading of the lorry, enters into a book called the Cotton Weight Book the weight of each bale. Having done that, he then hands a slip, of which he keeps a duplicate, to the counter-off who has delegated to him the task of supervising the loading of the lorry. The counter-off, having received that slip, reads its contents and makes out in triplicate, by means of a top copy and two carbons, a document which contains an acknowledgment by the lorry driver of the receipt of goods specified in good order and condition and states (i) the registered number of the vehicle and (ii) the number of bales on the lorry *ex* a particular ship. When a substantial number of the consignees' demands for the cargo *ex* that ship had been fulfilled, another consignee claiming to be entitled to part of that cargo would come along asking for a number of bales, and it would be found that there were not sufficient bales left on the quay to fulfil his requirements, let alone the requirements of any other consignees who might present authorised passes to collect. Then it was said that there was a deficiency.

Now how was that so-called deficiency proved or sought to be proved by the prosecution? They first called a representative of the shipping company, a claims adjuster or a gentleman of that kind, who simply produced a number of bills of lading. He looked at them and said, for example: "There should be X bales; they have all come from Rio de Janeiro; they are bales of Brazilian cotton." Thus, the jury were invited to assume, on that evidence, that if the bill of lading said "X bales," X bales were in fact off-loaded onto the quay, and that if the bill of lading said that the X bales were bales of Brazilian cotton, the cotton was in fact Brazilian. So much for the arrival. How did they seek to prove the departure? No checkers were called, just as for the purpose of proving the arrival no tallymen were called. Instead of calling the checkers, they called the counters-off, whose sole information with regard to the extent of the departures on the lorries of the consignees was derived from the slips of paper which had been handed to them by the checkers. Not surprisingly, counsel for the defence strongly objected to the admissibility of that evidence. It was clearly inadmissible, and equally clearly the evidence of the bills of lading was inadmissible. These bills of lading would have been completely irrelevant to any issue in this prosecution if they had been produced simply to show that someone had said: "I have received X bales on board the ship." That does not prove a deficiency. The only way in which a deficiency can be proved is to show that there were X bales on the ship and that X bales were in fact off-loaded from the ship at the quayside. One does not come anywhere near proving a deficiency at Liverpool by showing that at Rio de Janeiro the purser or someone on the purser's behalf had indorsed on a bill of lading "Received X bales on board." Equally valueless was the evidence adduced by the prosecution with regard to the bales which had left the quay by delivery to the lorries of the consignees, because, whereas they could have proved that by admissible evidence if they had chosen to call the checkers, assuming that the checkers had kept their records of what was loaded on each lorry presented by a consignee as they should have done, instead of that they called, not the checkers to say what they themselves had observed, but the counters-off to give evidence of what they had been told by the checkers in the form of the slips which the checkers handed to them. That evidence was clearly inadmissible. If it had been admissible at all, it would have been admissible only to prove that that was what the checker told the counter-off, and that would have been as irrelevant to any question arising in this prosecution as were the statements in the bills of lading.

Therefore, the whole of the case presented by the prosecution to the jury at the Liverpool Crown Court, so far as it was based on a multiplicity of coincidences, broke down on the threshold at both points. It broke down at the *terminus a quo*, because it was never proved by any admissible evidence what was off-loaded onto the quay, and it equally broke down from the other end, the *terminus ad quem*, because no admissible evidence was called to show what was in fact delivered to the consignees. In other words, there was no evidence at all of any deficiency. If there was no evidence of deficiency, the whole question of inviting the jury to assume that it was that deficiency which had in fact been sold by the appellants to the merchant fell down with it. In the result, this court reaches the conclusion that there was never

1958
Mar. 10, 11, 12, 13, 14, 17, 18

ALBERT VICTOR GORDON, THOMAS SPENCER

Streatfeild J., Slade J., Havers J.

any evidence at all to go to the jury on any of the counts in proof of which that was the sole evidence called. [After reviewing the evidence relating to the various counts His Lordship said that, in the opinion of the court, the conviction of the appellant Spencer must be quashed and the conviction of the appellant Gordon quashed on all counts except three, in respect of which they applied the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and that in his case the sentence should be reduced to one of 2 years' imprisonment.]

One conviction quashed.
One conviction quashed in part
and sentence reduced.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DONOVAN
AND MR. JUSTICE HAVERS

ST. MARGARET'S TRUST, LTD., OLIVER AUTOS, LTD., VICTOR RICHARD, SYDNEY JOHN HONE

1958
March 31;
Apr. 1, 21

Hire Purchase—Disposal of Goods Without Requirements of Statutory Instrument being Satisfied—Specified Percentage of Cash Price Not Paid—Hire-Purchase Finance Company—Absence of Mens Rea—Hire-Purchase and Credit Sale Agreements (Control) Order, 1956 (*S.I.* 1956, *No.* 180), *art.* 1 (*replaced by Hire-Purchase and Credit Sale Agreements (Control) Order,* 1957 (*S.I.* 1957, *No.* 430), *art.* 1).

By article 1 of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1956 (replaced by article 1 of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1957): "A person shall not dispose of any goods to which this order applies in pursuance of a hire purchase or credit sale agreement . . . unless the requirements specified . . . are or have been satisfied in relation to that agreement." The requirements included one that a specified percentage of the cash

1958
March 31;
Apr. 1, 21

St. Margaret's Trust Ltd., Oliver Autos Ltd., Victor Richard, Sydney John Hone

Goddard L.C.J., Donovan J., Havers J.

price, in the case of motor-cars 50 per cent., had to be paid before the signing of the agreement.

As a result of a conspiracy between a company engaged in buying and selling cars, two of its officers and certain customers who required cars on hire purchase, a false inflated cash price was stated to a hire-purchase finance company, who were thereby induced to advance more than they would had the truth been told to them. They were also informed untruthfully that the customer had already paid 50 per cent. of that false cash price, whereas he had not even paid 50 per cent. of the true cash price. As a result, the hire-purchase finance company executed a transaction forbidden by article 1, though they had admittedly acted quite innocently throughout. The finance company were convicted of disposing of goods in circumstances which contravened article 1, and the company engaged in buying and selling cars and its two officers of aiding and abetting the commission of those offences.

Held, that having regard to the object of the Order and to the fact that its words contained an express and unqualified prohibition of disposal of goods in the circumstances in which they were disposed of by the finance company, the question of *mens rea* did not enter into the offence committed by them and was irrelevant, and all the convictions were right.

Appeals against conviction.

The first appellants, St. Margaret's Trust, a hire-purchase finance company, were convicted at the Central Criminal Court on September 16, 1957, of seven offences of disposing of goods in circumstances which contravened article 1 of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1956. The second appellants, Oliver Autos, Ltd., a company engaged in buying and selling motor-cars, and the third and fourth appellants, Victor Richard and Sydney John Hone, two of the officers of the last-named company, were convicted of aiding and abetting the commission of the offences. They were sentenced by Diplock J.: the first appellants to a fine of £5 on each count, the second appellants to a fine of £50 on each count, the third appellant to a fine of £50 on each count, and the fourth appellant to a fine of £50 in all, with periods of imprisonment in default in the case of the last two appellants.

1958
March 31;
Apr. 1, 21

ST. MARGARET'S TRUST LTD., OLIVER AUTOS LTD., VICTOR RICHARD, SYDNEY JOHN HONE

Goddard L.C.J., Donovan J., Havers J.

As a result of a conspiracy between the second, third and fourth appellants and certain customers who required motor-cars on hire purchase, a false inflated cash price was stated to the first appellants, who were thereby induced to advance more than they would have done had the truth been told to them. They were also informed untruthfully that the customer had already paid 50 per cent. of that false cash price, whereas in fact he had not even paid 50 per cent. of the true cash price. Part of the excessive advance obtained from the first appellants was used to supply the deficiency. The transaction was, accordingly, carried out in a way which in law made the first appellants the owner of the vehicle; and since the word "dispose" in article 1 of the Order by definition included the disposal of the right to possession, the first appellants executed a transaction forbidden by article 1, inasmuch as 50 per cent. of the true cash price had not been paid before the signing of the hire-purchase agreement. The first appellants had admittedly acted quite innocently throughout. It was contended on their behalf that, in the absence of *mens rea*, they could not be convicted of an offence under article 1. The other appellants contended, that as in the absence of *mens rea* the first appellants had committed no offence, they themselves had not aided or abetted the commission of any offence.

Gerald Gardiner, Q.C., *and J. C. Lawrence,* for the appellants St. Margaret's Trust, Ltd.

The Hon. S. C. Silkin, for the other appellants.

F. H. Lawton, Q.C., *and Neville Faulks,* for the Crown.

The arguments appear fully from the judgment.

Cur. adv. vult.

Apr. 21. THE LORD CHIEF JUSTICE: Donovan J. will deliver the judgment of the court.

DONOVAN J.: On April 1, the court dismissed these appeals for reasons which we now proceed to give.

St. Margaret's Trust, Ltd., a company whose business comprises the financing of hire-purchase transactions, was convicted at the Central Criminal Court before Diplock J. on September 16, 1957, of seven offences of disposing of goods under circumstances which contravened article 1 of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1956, which is S.I. No. 180 of 1956, and is hereinafter called " the Order."

Oliver Autos, Ltd., a company engaged in buying and selling motor-cars, and Mr. Richard and Mr. Hone, two of its officers, were convicted of aiding and abetting the commission of these offences. All the appellants were fined, the fine upon St. Margaret's Trust, Ltd. being the nominal one of £5 for each offence. The case arose out of what is popularly known as " the credit squeeze." One aspect of this was a decision by the Government to restrict the amount of credit given in hire-purchase transactions; and to implement this decision the Order was made by the Board of Trade, pursuant to its statutory powers in that behalf which the Order recites. Article 1 thereof enacts that " A person shall not dispose of any goods to which this Order applies in pursuance of a hire purchase or credit sale agreement entered into after February 24, 1955, unless the requirements specified in the second schedule hereto are or have been satisfied in relation to that agreement." The requirements contained in the second schedule include a requirement that a specified percentage of the cash price of the goods must be paid before the signing of the agreement. The percentage is laid down in the first schedule to the Order and varies with the class of goods. In the case of " mechanically propelled vehicles " it is 50 per cent. One effect of the Order is therefore this, that a purchaser of a motor-car on hire purchase must pay a deposit of at least 50 per cent. of the cash price. Paragraph 3 of the second schedule allows the reasonable value of any car tendered in part exchange to be reckoned as part of the deposit.

The Order considerably restricted, as no doubt it was intended to do, the business of selling motor-cars on hire-purchase or credit terms, a business in which Oliver Autos, Ltd., are engaged, and that company, together with Richard and Hone, set themselves out deliberately and dishonestly to break the law. To describe what they did, it is unnecessary to go into figures. It is clear that, if a customer must pay at least 50 per cent. deposit on a car he wishes to purchase, any hire-purchase finance company like St. Margaret's Trust, Ltd., can advance no more than the remaining 50 per cent. It follows that the higher the cash price the larger will be this advance. If, therefore, the hire-purchase company is told and accepts that the cash price is a higher figure than it really is, the advance will be more than if the true cash price were revealed, and that excess may be used by the car dealer or the customer to make up the customer's deposit of 50 per cent. of the true cash price, if the customer himself is unable to provide it all. That is what was done in the present case. A false inflated cash price was stated to St. Margaret's Trust, Ltd., who were thereby induced to advance more than they would had the truth been told to them. They were also informed untruthfully that the customer had already paid his 50 per cent. of this false cash price. In fact he had not even paid the full 50 per cent. of the true cash price, and part of the excessive advance from St. Margaret's Trust was used to supply the deficiency. In these circumstances, since the transaction was carried out in a way which in law made St. Margaret's Trust, Ltd., the owner of the vehicle, and since the word " dispose " in article 1 of the Order by definition includes the disposal of the right to possession, it follows that St. Margaret's Trust, Ltd., executed a transaction which was forbidden by article 1, inasmuch as 50 per cent. of the true cash price was not paid before the signing of the hire-purchase agreement. St. Margaret's Trust Ltd., admittedly acted, however, quite innocently throughout. The fraud by which they were induced to dispose of the vehicle, although an inadequate deposit had been paid, was the result of a conspiracy between Oliver Autos, Ltd., Richard, Hone and the respective customers who wanted the cars.

In these circumstances, not surprisingly, St. Margaret's Trust, Ltd., argued before the learned trial judge that in the absence of *mens rea* on its part, it could not be convicted under article 1 of the Order. Oliver Autos, Ltd., and Richard and Hone in turn submitted that, as St. Margaret's Trust, Ltd., in the absence of *mens rea* on its part had committed no offence, they themselves had aided and abetted the commission of no offence. None of the respective customers was charged, they being called instead as witnesses for the Crown. The prosecution, while admitting the absence of *mens rea* in St. Margaret's Trust, Ltd., contended that this was irrelevant and that the prohibition contained in article 1 of the Order was absolute in the sense that, if a prohibited transaction was entered into, an offence was committed even if the person concerned did so innocently. Diplock J. upheld this view. He then granted a certificate of appeal on the ground that in the preceding session of the Central Criminal Court Barry J. had come to an opposite conclusion in a similar case. The present appellants, however, had at the time of Barry J.'s ruling already been committed for trial, so that the prosecution were able, when the matter came before Diplock J., to argue the point afresh.

The language of article 1 of the Order expressly prohibits what was done by St. Margaret's Trust, Ltd., and, if that company is to be held to have committed no offence, some judicial modification of the actual terms of the article is essential. The appellants contend that the article should be construed so as not to apply where the prohibited act was done innocently; in other words, that *mens rea* should be regarded as essential to the commission of the offence. The appellants rely upon the presumption that *mens rea* is essential for the commission of any statutory offence unless the language of the statute, expressly or by necessary implication, negatives such presumption. The matter was thus put by R. S. Wright J. in his well-known judgment in Sherras *v.* de

RUTZEN [1895] 1 Q.B. 918, at p. 921: "There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

A little nearer to the present day Kennedy L.J. put the matter in this way in HOBBS *v.* WINCHESTER CORPORATION [1910] 2 K.B. 471, at p. 483: "I think there is a clear balance of authority that in construing a modern statute this presumption as to *mens rea* does not exist. I think with great respect to my brother Channell that he has applied to the construction of this modern statute a maxim which is recognised as applicable to offences at common law, and it may be, as Stephen J. suggests in CUNDY *v.* LE COCQ (1884) 13 Q.B.D. 207, also to offences under the earlier statutes which are to be treated on the same basis as offences under the common law. To quote his words, so far as they have not been quoted—and I accept the view which Stephen J. there states—'In old time, and as applicable to the common law or to earlier statutes, the maxim'—that is, the maxim that in every criminal offence there must be a guilty mind—'may have been of general application; but a difference has arisen owing to the greater precision of modern statutes. It is impossible now, as illustrated by the cases of PRINCE (1875) L.R. 2 C.C.R. 154 and BISHOP (1880) 5 Q.B.D. 259, to apply the maxim generally to all statutes, and the substance of all the reported cases is that it is necessary to look at the object of each Act that is under consideration to see whether and how far knowledge is of the essence of the offence created.'" What Kennedy L.J. is here saying, we think, is that modern statutes create offences where knowledge on the part of an offender is not essential, and that accordingly there is no universal prior presumption of *mens rea*. Each statute must be construed according to its terms and its object. If so construed *mens rea* is not expressly or by necessary implication excluded, it is then that it will be regarded as essential. Other cases cited in the course of the argument included NICHOLAS *v.* HALL (1873) L.R. 8 C.P. 322; TOLSON (1889) 23 Q.B.D. 168; BROOKS *v.* MASON [1902] 2 K.B. 743; BREND *v.* WOOD (1946) 62 T.L.R. 462; HARDING *v.* PRICE [1948] 1 K.B. 695; REYNOLDS *v.* G. H. AUSTIN AND SONS, LTD. [1951] 2 K.B. 135; MOUSELL BROS. *v.* LONDON AND NORTH WESTERN RY. [1917] 2 K.B. 836; QUALITY DAIRIES (YORK), LTD. *v.* PEDLEY [1952] 1 K.B. 275.

There is no difference for present purposes between a statute and a statutory instrument and the question for determination is therefore this: Do the words of article 1 of the Order considered together with the object of the Order make the prohibited act an offence, even though the doer of the act had no guilty mind and acted innocently?

The words of the Order themselves are an express and unqualified prohibition of the acts done in this case by St. Margaret's Trust, Ltd. The object of the Order was to help to defend the currency against the peril of inflation which, if unchecked, would bring disaster upon the country. There is no need to elaborate this. The present generation has witnessed the collapse of the currency in other countries and the consequent chaos, misery and widespread ruin. It would not be at all surprising if Parliament, determined to prevent similar calamities here, enacted measures which it intended to be an absolute prohibition of acts which might increase the risk, in however small a degree. Indeed, that would be the natural expectation. There would be little point in enacting that no one should breach the defences against a flood, and at the same time excusing anyone who did it innocently. For these reasons we think that article 1 of the Order should receive a literal construction and that the ruling of Diplock J. was correct.

It is true that Parliament has prescribed imprisonment as one of the punishments that may be inflicted for a breach of the Order, and this circumstance is urged in support of the appellants' argument that Parliament intended to punish only the guilty. We think it is the better view that, having regard to the gravity of the issues, Parliament intended the prohibition to be absolute, leaving the court to use its powers to inflict nominal punishment or none at all in appropriate cases. It may also be true that hire-purchase transactions, in order to avoid difficulties under the Bills of Sale Acts, are carried through in such a way that the finance companies concerned become easy victims of such a fraud as was here perpetrated on St. Margaret's Trust, Ltd., for they have no control over the car dealer or the customer. But if Parliament enacts that a certain thing shall not be done, it is not necessarily an excuse to say: " I carry on my business in such a way that I may do this thing unwittingly and therefore should suffer no penalty if I transgress." The answer in some cases is that the importance of not doing what is prohibited is such that the method of business must be re-arranged so as to give the necessary knowledge. The present, we think, is such a case.

Stress was also laid during the course of the argument for the appellants upon the language of article 3 of the Order, which prohibits any person from causing or permitting goods owned by him to be in the possession of another by virtue of a hire-purchase agreement under certain circumstances. It is said that the words " cause or permit " involve that *mens rea* is essential to the commission of an offence under article 3, and it is not to be supposed that the same Order requires *mens rea* for the commission of an offence under one article and not under another. The argument is obviously double-edged: for the prosecution might argue that the presence of the words " cause or permit " in article 3 shows that their omission in article 1 was deliberate and that therefore, the inference regarding *mens rea* is the opposite to that contended for by the appellants. It is not, however, possible to deal adequately with the argument without knowing exactly the type of transaction envisaged by article 3, and this seems to be in doubt. It might be of such a type that, in contradistinction to the transactions covered by article 1, it would be reasonable to

1958
March 31;
Apr. 1, 21

ST. MARGARET'S TRUST LTD., OLIVER AUTOS LTD., VICTOR RICHARD, SYDNEY JOHN HONE

Goddard L.C.J., Donovan J., Havers J.

imply that *mens rea* was a necessary ingredient of any transgression. But, regarding the matter purely as one of construction, we are not prepared to say that the presence of the words "cause or permit" in article 3 outweighs the considerations we have referred to as bearing on the construction of article 1. It should not be inferred from what we have said that we are deciding that *mens rea* is required by the language of article 3. We leave that point entirely open, to be decided if and when the issue directly arises, which it does not do in the present case.

[The court ordered that the appellants should pay the costs of the appeals.]

Appeals dismissed.

Solicitors: Dennison, Horne & Co., for the first appellants; Lewis Silkin & Partners, for the other appellants; The Solicitor, Board of Trade, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY
AND MR. JUSTICE DONOVAN

1958
Apr. 21

CHARLES EDGAR
GEORGE HARRY PARR
PETER PONTIKA
THOMAS ANDREW ROONEY

Depositions—Failure of Examining Magistrate to Sign Some of Depositions and Jurat—Irregularity—Effect on Committal—Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 7 (1)—*Magistrates' Courts Rules*, 1952 (*S.I.* 1952, *No.* 2190), *r.* 5 (2).

The appellants were committed for trial for receiving stolen property and all but Pontika for shopbreaking and larceny in the alternative. The committal proceedings took place on three

1958
Apr. 21

CHARLES EDGAR, GEORGE HARRY PARR, PETER PONTIKA, THOMAS ANDREW ROONEY

Goddard L.C.J., Hilbery J., Donovan J.

separate days. There was no irregularity with regard to the depositions taken on the first and third days, but the examining magistrate signed none of the depositions taken on the second of the three days, on which day most of the evidence was given, nor the jurat at the end of those depositions. The appellants were convicted of receiving stolen property.

Held, dismissing the appeal, that (1) the depositions taken on the second day were not taken in accordance with rule 5 (2) of the Magistrates' Courts Rules, 1952, and should, therefore, be disregarded when deciding whether or not there had been a valid committal for trial; (2) the depositions taken on the first and third days were properly taken and could be considered apart from those taken on the second day; (3) if, upon the depositions which were properly taken a prima facie case was disclosed, the committal was valid; (4) the depositions properly taken in this case disclosed a prima facie case of receiving stolen property and therefore the committal for that offence was valid.

Appeals against conviction.

The appellants were convicted at the Central Criminal Court on January 23, 1958, of receiving stolen goods and were sentenced by the Commissioner (Judge Aarvold): the appellants Edgar, Parr and Rooney each to two years' imprisonment and the appellant Pontika to nine months' imprisonment. The indictment contained four counts and charged also two other prisoners, who were acquitted. The first count as preferred charged all except Pontika with breaking and entering shop premises and stealing therein certain property. The second count charged all with receiving a large quantity of property knowing it to be stolen. The third count charged the appellant Rooney only with receiving two pieces of property, knowing them to be stolen. The fourth count charged the appellant Rooney only with receiving certain other property.

The case was before the examining magistrate on three different occasions, and on the first occasion a police officer gave evidence against the prisoners with regard to statements made by them. On the second occasion several witnesses were examined with regard to the facts of breaking and entering and receiving, and on the third occasion another police sergeant

1958
Apr. 21

CHARLES EDGAR, GEORGE HARRY PARR, PETER PONTIKA, THOMAS ANDREW ROONEY

Goddard L.C.J., Hilbery J., Donovan J.

gave evidence. On the second occasion, December 17, 1957, none of the actual depositions were signed by the magistrate and through some mishap or oversight—it is impossible to know how it happened—he did not sign the *jurat.*

There was a motion made to quash the indictment and the Commissioner quashed count one against all the prisoners charged therein and also count two against the two other men, who were then discharged, and also count four against Rooney only. That left count two against all the appellants and count three against Rooney only, which the Commissioner held to be good, because the evidence given by the officers on the first and third days, though it did not establish a prima facie case of breaking and entering, did establish one of receiving on count two against the appellants and on count three against Rooney and therefore there was evidence on which the magistrate could commit for receiving, though not for breaking and entering.

Miss P. G. Coles for the appellant Edgar.

In the court below the judge relied on PHILLIPS & QUAYLE (1938) 26 Cr.App.R. 200; [1939] 1 K.B. 63, but in that case the counts upheld were founded on evidence contained in depositions regularly taken, whereas in this case the receiving count against Edgar was founded on evidence contained in depositions some of which were regularly taken and some not.

M. D. L. Worsley for the appellants Parr and Pontika.

Each actual deposition ought to be signed by the examining magistrate: Magistrates' Courts Rules, 1952, rule 5 (2). In contemplation of law the depositions and the certificate (jurat) are quite separate documents, see Criminal Justice Act, 1952, s. 13 (3), and the requirement that the depositions be signed is not fulfilled by signature of the certificate. The effect of PARKER (1870) L.R. 1 C.C.R. 225 was reversed by the Criminal Justice Act, 1925, s. 13 (3). If the magistrate does not sign the actual deposition, there is nothing to distinguish it from a written statement, *e.g.*, to the police; alternatively, if signature of the jurat is sufficient, the jurat at the end of each hearing must be signed. As the jurat dated December 17 was not signed. the committal for receiving was a nullity, as the Magistrates' Courts Act, 1952, s. 7 (1), makes compliance with the Magistrates' Courts Rules, 1952, a condition precedent to a valid committal. The principle expressed in Gee & Ors. 25 Cr. App.R. 198; [1936] 2 K.B. 442 that section 17 of the Indictable Offences Act, 1848 (now section 7 (1) of the Magistrates' Courts Act, 1952, and rule 5 (2) of the Rules of 1952), must be strictly complied with, applies to this case. The trial judge ought not to have looked at the depositions regularly taken to see whether there was a prima facie case disclosed thereon. R. *v.* County of London Sessions, *ex parte* Downes, 37 Cr.App.R. 148, at p. 152; [1954] 1 Q.B. 1. Section 7 (1) of the Act of 1952, requires that the magistrates' court, not the judge at the trial, must be of opinion that there is sufficient evidence to put a prisoner on trial.

J. W. Harkess, for the appellant Rooney.

The depositions taken on December 17, 1957, were not properly taken; France (1839) 2 Moo. & Rob. 207. I adopt Miss Coles' argument, *supra.*

J. B. R. Hazan, for the Crown was not called upon.

The Lord Chief Justice: The appellants in this case were indicted at the Central Criminal Court on an indictment containing four counts. The first count in the indictment as preferred charged them (except the appellant Pontika) with breaking and entering shop premises and stealing therein certain property. The second count charged them with receiving a large quantity of property knowing it to be stolen. The third count charged the appellant Rooney only with receiving two pieces of property, watches and a wallet, knowing them to be stolen. The fourth count was against the appellant Rooney only and charged him with receiving certain other property.

There was a motion made to quash the indictment, and the learned Commissioner quashed count one and count four against

Rooney, leaving to be tried against all these appellants count two and against the appellant Rooney count three also. The objection which has been taken—and counsel is entitled to take every technical objection he can that arises on behalf of his clients—in this case is of the highest technicality.

As is well known, the Administration of Justice (Miscellaneous Provisions) Act, 1933, abolished grand juries and substituted for presentments to grand juries committal for trial by magistrates. Magistrates when proceeding to act as examining magistrates were before the Magistrates' Courts Act, 1952, governed by the Indictable Offences Act, 1848, and since then by the Act of 1952. Rules 5 (2) of the Rules made under the Act provides that, when depositions are taken, the deposition is to be read over to the deponent and signed by him and the deposition is to be signed by the magistrate. Of course that is to authenticate the document, so that there may be no question about it being the deposition of the witness.

The case was before the learned magistrate at North London Magistrates' Court on three different occasions, and on the first occasion a police officer gave evidence against the prisoners who remained to be tried with regard to statements they had made. On the second occasion several witnesses were examined on the facts of breaking and receiving, and on the third occasion another police sergeant gave evidence. Through some mishap or some oversight—it is impossible to know how it happened—the learned magistrate did not sign the deposition that had been taken on December 17. I am not staying to consider whether, when that mistake was discovered, the Commissioner who tried the case at the Central Criminal Court, might not have sent them back to be signed; it was simply a mistake. It was a slip and they were not signed, and accordingly counsel moved to quash the indictment on the ground that the committal was bad in that the Act had not been complied with, and a long discussion took place and a great many cases were cited but, when the matter comes down to be decided, it seems to me a perfectly simple point. The magistrate did sign the deposition of the police officer on the first occasion when the matter was before him. He also signed the deposition of the police officer on the third occasion when the case was before him, and it was obvious that the evidence given by those two officers against the prisoners would have justified committal for trial.

The question, therefore, is whether, because certain depositions were taken which were not signed, that renders the whole committal bad. In the opinion of the court, it does not. We are assuming that those depositions were inadmissible for any purpose for which a deposition could be read or used. We are also assuming that if the magistrate has evidence of witnesses taken before him and he has not signed the depositions, those depositions would not be usable for committal for trial, though I am far from saying they might not be brought back to him and signed, at any rate before the Commission Day of the Assizes, but we need not go into that. It is perfectly clear to the court that there was before the magistrate evidence of the two police officers which was enough to justify the magistrate in committing, and the fact that there were equally depositions which were not signed and there was that irregularity cannot affect the question. That is the whole question in this case, whether the committal was a good committal. The learned Commissioner held that it was a good committal except with regard to count one, because the evidence given by the officers did not deal with the breaking and entering, but did deal with the receiving. Therefore, he said, there was evidence on which the magistrate could commit for receiving, though he could not commit for breaking and entering. The learned Commissioner quashed the count for breaking and entering, and so far as the prisoner Rooney was concerned quashed count four, which charged him alone. As a matter of fact, Cassels J. who was sitting at the Old Bailey at the time, was asked to get over this difficulty by giving leave to prefer a bill against Rooney and a bill was preferred against Rooney. If we quashed the conviction against Rooney, he would have to stand his trial on that bill, but we need not go into these matters beyond saying that before the court there were two depositions which

1958
Apr. 21

Charles Edgar, George Harry Parr, Peter Pontika, Thomas Andrew Rooney

Goddard L.C.J., Hilbery J., Donovan J.

were regularly signed and which justified a committal on the charge of receiving, and therefore this appeal fails and is dismissed.

Appeal dismissed.

Solicitors: The Solicitor, Metropolitan Police, for the Crown.

[The Editor is indebted to M. D. L. Worsley, Esq, for the preparation of this Report.]

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY
AND MR. JUSTICE DONOVAN

1958
Apr. 28

BEER *v.* DAVIES

Road Traffic—Notice of Intended Prosecution—Service—Notice Sent by Registered Post to Defendant's Address—Notice Not Received by Defendant—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 21.

Where a notice of intended prosecution under section 21 of the Road Traffic Act, 1930, is purported to be sent by registered post, proof that it was correctly directed, stamped and posted is not conclusive proof that it has been "served on or sent by registered post to" the addressee, within the meaning of subparagraph (*c*) thereof. It is open to the addressee to show that the notice was not in fact delivered, and if he establishes that fact, and if the prosecution cannot avail themselves of the proviso to section 21, there has been a failure to comply with the requirements of the section with regard to the notice.

R. *v.* County of London Quarter Sessions, *ex p.* Rossi [1956] 1 Q.B. 682 applied.

Case stated by a metropolitan magistrate.

An information was preferred at Bow St. Magistrates' Court by the appellant James Beer, a police officer, charging the respondent, George Robert Davies, a London General Omnibus driver, with careless driving on June 10, 1957. A notice of intended prosecution under section 21 of the Road Traffic Act, 1930, was sent to the respondent on June 20, 1957, ten days after the accident which gave rise to the prosecution. The notice was sent by registered post to the address which the respondent had given to the police officer who had investigated the accident just after its occurrence. On June 27, the notice and its envelope were returned to the police by the post office. The respondent had not in fact received the notice, as he was absent from his home on holiday from June 15 to 22, and between those days there was no one in his home who could take in a registered letter. The prosecutor made no inquiries with regard to the whereabouts of the respondent nor did he consult the London Transport Executive, who, to his knowledge, were the respondent's employers. On July 2, a police officer saw the respondent at his home, personally served on him a second notice and explained what had happened with regard to the original notice.

The magistrate held that notice had not been " served on or sent by registered post to " the respondent within 14 days of the accident and that, accordingly, section 21 of the Road Traffic Act, 1930, had not been complied with by the prosecution. He dismissed the information and the prosecution appealed.

Paul Wrightson, for the appellant.
H. F. Newman, for the respondent.

THE LORD CHIEF JUSTICE: This is a case stated by Mr Blundell, one of the metropolitan magistrates, which raised once again a question under section 21 of the Road Traffic Act, 1930, which has frequently given this court trouble.

The circumstances are that after a not very serious accident the Commissioner decided to prosecute for careless driving, and a notice of intended prosecution was sent on June 20, 1957, ten days after the accident. It was sent by registered post to the

1958
Apr. 28

BEER *v.* DAVIES

Goddard L.C.J., Hilbery J., Donovan J.

address which the respondent had given to the police officer who investigated the accident at the time. On June 27, the notice in its envelope was returned to the police by the General Post Office, the letter being marked by the post office " Undelivered for reasons stated. No response to 739." 739, I suppose, was the postman's number, who could not deliver the letter because there was no response at the place of address.

The magistrate finds: " The respondent did not in fact receive such notice, because he was away from his home on holiday from June 15 to June 22, 1957. Between these said days there was no one in the respondent's home, so no registered post could be taken in. The appellant made no inquiries as to the whereabouts of the respondent nor did he consult the London Transport Executive who, to the appellant's knowledge, were employers of the respondent. No notice of intended prosecution was served by the appellant on the respondent's employers. As soon as it was discovered that the respondent was away on holiday, after receipt by the police of the returned notice on June 27, 1957, a police officer saw the respondent at his home on July 2, 1957, and personally served on him a second or duplicate notice and explained to him what had happened to the original notice. The respondent's employers knew he was away on holiday and would not be returning to work until June 30, 1957, but they did not know where he was on holiday or how to get in touch with him." The result of all that is that the notice was sent within 14 days to the respondent, but the notice was not delivered.

Section 21 provides that a person prosecuted for a driving offence under the Act shall not be convicted " unless either—(*a*) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration; or (*b*) within fourteen days of the commission of the offence a summons for the offence was served on him; or (*c*) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence."

Before I read the proviso, I will say this: A notice can be served by serving it on the proposed defendant—that is personal service—or by serving it by registered post. Since various other cases in this court, which I need not consider, the matter has been dealt with by the Court of Appeal, it is true, with regard to service of a notice under another Act. But the question with which they have dealt is a question of service and the matter of service by post is dealt with by section 26 of the Interpretation Act, 1889, which provides: " Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve,' or the expression 'give' or 'send,' or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post." The Court of Appeal in R. *v.* COUNTY OF LONDON QUARTER SESSIONS, *Ex p.* ROSSI [1956] 1 Q.B. 682, seems to me to have decided that, where a notice is purported to be served by registered post, it is not enough to prove that it was correctly directed, stamped and posted. That is prima facie enough, but it can be shown by the defendant that the letter was never delivered, and, if the letter was never delivered, the Court of Appeal have said that there has not been service and that section 26 of the Interpretation Act does not assist. It is true that the case with which the Court of Appeal was dealing was under a different Act, and not the Road Traffic Act, 1930. It was an appeal to quarter sessions in a bastardy matter, but the substance of the decision applies equally here, because the section which the Court of Appeal were considering was section 3 of the Summary Jurisdiction (Appeals) Act, 1933, and that section provides for the giving

1958
Apr. 28

Beer *v.* Davies

Goddard L.C.J., Hilbery J., Donovan J.

of various notices, and says: "A notice required by this subsection to be given to any person may be sent by post in a registered letter addressed to him at his last or usual place of abode." What happened in that case was that the alleged putative father, and the man who had been adjudged by the magistrate not to be the putative father, who was the respondent to the mother's appeal, had left the house where he had been living, and a notice was sent to him by registered post at the house which was his last known place of abode. He had gone away, and the letter was not taken in, and the Court of Appeal held that there was no service and reversed the decision of this court, which held that there had been service. One of the things that caused this court to decide there had been service was that we thought the man was deliberately evading service, so that the unfortunate woman could not know where he was. She knew where he ordinarily lived, and she sent the notice there, but it was proved that he had gone away. We thought that he was evading service, and that the section had been complied with, but the Court of Appeal said that that was wrong. Denning L.J. said in the course of his judgment (at p. 693): "Evading service would be a ground for ordering personal service or substituted service, but not for dispensing with service altogether." With great respect to the learned Lord Justice, I know there are many rules of the Supreme Court which deal with substituted service of writs or other proceedings. I do not know of any rule in the Magistrates' Courts Act, 1952, or anywhere else which allows for substituted service of notices which have to be given under the Acts which apply in those courts. It may be, in view of the expression of opinion of Denning L.J., that one may go to a court and ask for leave to serve a notice by substituted service. How that can be done in the case of an appeal to quarter sessions I have no knowledge. Are you to apply to the magistrates for leave to serve by substituted service, or are you to apply to quarter sessions, which is the court which has to try the case? Quarter sessions probably will not be able to sit in time for the application to be made, because they sit only so many times a year. I confess that I do not understand how substituted service can be effected, but at any rate there is the decision of the Court of Appeal that service of a notice sent by registered post but not delivered is not good service, and I do not see, therefore, that we can possibly hold otherwise in this case without disregarding the decision of the Court of Appeal, though technically it may not be binding because this is a criminal cause or matter.

After hearing full argument, it seems to me that we are bound to decide there has not been service in this case, and then comes the question whether the proviso is brought into play. The proviso says: " Provided that (i) Failure to comply with this requirement shall not be a bar to the conviction of the accused in any case where the court is satisfied that—(1) neither the name and address of the accused nor the name and address of the registered owner of the vehicle, could with reasonable diligence have been ascertained in time for a summons to be served or for a notice to be served or sent as aforesaid; or (2) the accused by his own conduct contributed to the failure." Therefore, before the failure to serve can be excused, the court has to be satisfied that neither the name nor the address of the accused or his employer could be ascertained, because it will be remembered that the provision of the section is that the notice can be sent by registered post to the person registered as the owner of the vehicle as well as to the actual driver at the time. It seems to me that it is impossible to bring that part of the proviso into play, because the police certainly knew the registered owner of the vehicle, that is to say, the London Transport Executive. I quite understand their position. Naturally they served the notice on the driver whose name and address they had got. It was because the post office took some time to return the notice to the police that they had not time then to serve the registered owner, but that is a matter of which the respondent can take advantage. We cannot rewrite the section. Then it is said that the accused by his own conduct contributed to the failure because he had given an address and had not said to the police " I am going to be away on a certain day."

Whether or not he knew he was going to be away on the day, he, at any rate, would not know that he was going to be prosecuted. The very object of this notice is to tell him that he is going to be prosecuted. Still less would he know when the notice was going to be served upon him. I think the words "the accused by his own conduct contributed to the failure" apply where the accused has done something which prevented the police from serving him, such as giving a false address.

For these reasons I think the magistrate came to a correct decision and the appeal fails.

Hilbery J. I am of the same opinion. Section 21 of the Road Traffic Act, 1930, provides certain restrictions on prosecutions under the preceding section, and under the preceding section it is the duty of the driver to give his name and address. Under section 21 it is provided: "Where a person is prosecuted for an offence under any of the provisions of this Part of this Act relating respectively to the maximum speed at which motor vehicles may be driven, to reckless or dangerous driving, and to careless driving he shall not be convicted unless either—(a) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration; or (b) within fourteen days of the commission of the offence a summons for the offence was served on him; or (c) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence."

The accident in this case which led to an attempt to serve a notice of an intended prosecution occurred on June 10, 1957. On June 20, a notice purporting to be a notice pursuant to section 21 (*c*) was sent to the address of the respondent which he had given to the police at the time when particulars were taken about the accident. He happened to be away on his

1958
Apr. 28

BEER *v.* DAVIES

Goddard L.C.J., Hilbery J., Donovan J.

holiday, and there was nobody to take in the registered letter, and the postman returned it. Unfortunately the post office delayed in sending it back to the police as a letter which they had been unable to deliver until the 27th, and of course it was then too late, because fourteen days had gone by, for the police to send the notice to the owner of the respondent's vehicle. The vehicle was a London passenger omnibus, and the London Transport Executive was the owner, but in the circumstances the police could not effectively send a notice within fourteen days to the owner.

For the reasons given by my Lord, I am of opinion that we cannot hold that in this case there was a sufficient giving of the notice merely by sending the notice by registered post to the defendant at the address which was his address. We are precluded, it seems to me, clearly by the decision of the Court of Appeal in R. *v.* COUNTY OF LONDON QUARTER SESSIONS, *Ex p.* ROSSI (*supra*). I refer particularly to the judgment of Morris L.J., where I think the matter with regard to which we are precluded is made perfectly clear. After quoting the whole of section 26 of the Interpretation Act, with which I need not deal again, he refers to the Summary Jurisdiction (Appeals) Act, 1933, and he says (at p. 697): "The Act of 1933 clearly permits or authorises the giving of a notice as to a hearing by sending a document by registered post. But if the primary obligation of giving notice means in this context the giving of some form of notice which reaches the party interested so that he may be present or represented at a hearing, then the permissive user of the post denotes a user so that notice may reach the party interested so that he may be present or represented at the hearing. It was, therefore, entirely proper to send a notice to Mr. Rossi by registered post. Applying the provisions of section 26 of the Interpretation Act, since no contrary intention appears from the Act of 1933, the sending of the notice to Mr. Rossi was deemed to be effected by properly addressing, prepaying and posting the letter which contained the document. Then by the concluding words of section 26, the sending of the notice was deemed, unless the

1958 *Apr.* 28

BEER *v.* DAVIES

Goddard L.C.J., Hilbery J., Donovan J.

contrary was proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of post. But here the contrary was proved. It was proved, not merely that the letter was not delivered in the ordinary course of post but that the letter was not delivered at all." For that reason the learned Lord Justice said that there was no compliance with the requirements of the Summary Jurisdiction (Appeals) Act, 1933, that a notice required by the subsection to be given might be sent by post in a registered letter addressed to him at his last or usual place of abode. In those circumstances, it seems to me quite plain that we, too, are bound now to give that interpretation to these words in section 21 of the Act of 1930.

Mr. Wrightson then falls back upon the proviso, but the proviso, in my view, on its plain language can only be used where there has been a failure to comply with the requirements of section 21 because (1) " neither the name and address of the accused nor the name and address of the registered owner of the vehicle, could with reasonable diligence have been ascertained in time for the summons to be served or for a notice to be served or sent as aforesaid." Those words relate to the provision in section 21 that such a notice may be given to the person who has been driving the car or to the owner of the car and, those alternatives being open, in order to obtain the benefit of the proviso, the police must show that neither of those alternatives was open to them by the exercise of reasonable diligence. Here that cannot be shown, because by the exercise of less than diligence, since the vehicle was a public omnibus owned by the London Transport Executive, there was no difficulty about serving the notice on the owner.

Finally, Mr. Wrightson relies upon the second part of the proviso, namely, that the respondent by his own conduct contributed to the failure, but here all that is shown is that the driver of the omnibus, the respondent, having given his correct address, in the ordinary course of his employment apparently went away on his annual holiday. He was not to know, because no warning had been given to him that there might be a prosecution, that the police would be serving any such notice as is required by section 21. He was not in any sense taking any action to avoid service, and in my opinion, without stating anything which would be regarded hereafter as binding on the construction of those words in the second part of the proviso, it is enough to say that, in my view at any rate, what the respondent did here did not amount to conduct which contributed to the failure of the police to serve on him the notice under section 21 which they wished to serve.

For these reasons I agree with the judgment of my Lord.

DONOVAN J.: I agree with both judgments which have been delivered, and have nothing to add.

Appeal dismissed.

Solicitors: The Solicitor, Metropolitan Police, for the appellant; Geoffrey B. Gush & Co., for the respondent.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS
AND MR. JUSTICE DIPLOCK

1958
May 12

JOHN RICHARD HAMMERSLEY
TREVOR ERNEST HEATH
SAMUEL BELLSON

Conspiracy—Indictment—Whether One or More Conspiracies Charged—Whether Sufficient Particulars Supplied—Alleged Variance from Charge on Committal—Indictments Act, 1915 (5 *& 6 Geo.* 5, *c.* 90), *s.* 3—*Administration of Justice (Miscellaneous Provisions) Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 36), *s.* 2 (2).

The appellants, the first two of whom were police officers in the borough of Brighton, and the third of whom was a bookmaker, were convicted on an indictment in which the statement of offence was "conspiracy to obstruct the course of public justice." The particulars of offence were that between January

1, 1949, and October 18, 1957, they and two other persons, who were acquitted, one being R., the chief constable of the borough, conspired together and with other persons unknown to obstruct the course of public justice in that the first two appellants and R. should act contrary to their public duty as police officers in relation to the administration of the law. They had been committed for trial upon a charge that between the afore-mentioned dates they did conspire together and with other persons unknown corruptly to solicit and obtain rewards for R. and the first two appellants for showing or promising favours contrary to their duty as police officers and thereby to obstruct and defeat the course of public justice, contrary to the common law. The evidence disclosed by the depositions suggested that R. or one of the first two appellants had corruptly taken rewards to hinder prosecutions by not bringing offenders before the courts or by warning persons of charges which were going to be brought, and that the third appellant had introduced the persons concerned to one or more of the police officers charged. The prosecution had prepared lengthy particulars, stating exactly the matters which were going to be alleged against the accused persons, but these particulars were not included in the indictment.

Held, that contentions that the indictment was bad on any of the grounds (i) that it charged more than one conspiracy, (ii) that it did not contain sufficient particulars of the offence charged, or (iii) that it did not follow the charge in the committal proceedings and was not within the words of the proviso to section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, could not be supported, and that the indictment was valid and in proper form.

Appeals against conviction.

The appellants were convicted at the Central Criminal Court on February 28, 1958, after a trial lasting twenty days and were sentenced by Donovan J.: Hammersley and Heath each to five years' imprisonment and Bellson to three years' imprisonment.

The charge preferred at the magistrates' court against the appellants and two other defendants who were acquitted, one of these being Ridge, the chief constable of Brighton, was that between January 1, 1949, and October 18, 1957, they did conspire together and with other persons unknown corruptly to solicit and obtain rewards for Ridge, Hammersley and

1958
May 12

JOHN RICHARD HAMMERSLEY, TREVOR ERNEST HEATH, SAMUEL BELLSON

Goddard L.C.J., Cassels J., Diplock J.

Heath for showing or promising favours contrary to their duty as police officers and thereby to obstruct and defeat the course of public justice, contrary to common law. The evidence disclosed by the depositions suggested that either Ridge, Hammersley or Heath had corruptly taken rewards for hindering prosecutions or for giving warning of intended prosecutions and that Bellson, who was a bookmaker, had introduced the persons concerned to one or more of the police officers charged. On this charge the five persons were committed for trial. The indictment was in the following form: " Statement of offence: Conspiracy to obstruct the course of public justice." The particulars of offence alleged that the five named defendants " between the 1st day of January, 1949 and the 18th day of October, 1957, in the County Borough of Brighton, conspired together and with other persons unknown to obstruct the course of public justice, in that the said Trevor Ernest Heath, John Richard Hammersley and Charles Field William Ridge should act contrary to their public duty as police officers in relation to the administration of the law." The prosecution prepared lengthy particulars, stating exactly the matters which were going to be alleged against the defendants, but these particulars were not included in the indictment.

Donald McIntyre, Q.C. (*David Peck* with him), for the appellant Hammersley. If the appellant had not been tried on the present indictment, he would have been charged on an indictment which charged him with only three specific crimes, of corruptly obtaining or attempting to obtain sums of money as a reward for showing favour. It had never been directly suggested that he had committed any other crime, but by the present conspiracy charge the prosecution were seeking to make the suggestion of other crimes, as it were, by a side wind. If these three matters had been the only allegations against him, he would have stood a good chance of acquittal. A prosecution should be subject to reasonable limitations with regard to the field over which it can range, and persons accused should know exactly of what they are accused. Further, the

1958
May 12

John Richard Hammersley, Trevor Ernest Heath, Samuel Bellson

Goddard L.C.J., Cassels J., Diplock J.

jury ought to be in the position that they would be able to return a finding on every particular matter in respect of which they convicted or acquitted. Here the indictment was in the vaguest possible terms, and none of the appellants could know what view the jury took or what matters they regarded as proved. [The Lord Chief Justice: Are you submitting that on a charge of conspiracy the prosecution are entitled only to give evidence of joint acts and cannot give evidence of individual acts?] No, but any individual act given in evidence must have some relevance to the agreement, and if it has no relevance or is equivocal, the prosecution are taking a risk and a verdict supported by that kind of evidence may have to be set aside.

Edward Clarke (*Basil Hobson* with him), for the appellant Heath. The count for conspiracy was bad on the grounds of (a) uncertainty, (b) duplicity, (c) prejudice to the defence. A count alleging conspiracy to obstruct the course of justice over a period of nearly nine years is too uncertain, and detailed particulars given by the prosecution cannot remedy this defect. The evidence at the trial went beyond even that referred to in the particulars which the prosecution supplied. The evidence at the trial disclosed many conspiracies and not one conspiracy only, and the appellants should have been tried either on substantive counts or an indictment alleging several conspiracies. [He referred to Cooper and Compton (1947) 32 Cr.App.R. 102; Luberg (1926) 19 Cr.App.R. 133, and Mulcahy (1868) L.R. 3 H.L. 306.] Further, the verdict of the jury on the one count could not indicate the view which the jury had formed as to the extent of the appellants' guilt and the charge was, therefore, a prejudicial charge.

Victor Durand, Q.C. (*J. W. Harkess* with him), for the appellant Bellson. The judge should have ruled at the close of the case for the prosecution that the indictment was bad in law because it disclosed more conspiracies than one. In cases of agreement to defeat the course of justice the law of criminal conspiracy has gone somewhat beyond the bounds of ordinary criminal law because courts have been anxious to

1958
May 12

John
Richard
Hammersley,
Trevor
Ernest
Heath,
Samuel
Bellson

Goddard
L.C.J.,
Cassels J.,
Diplock J.

suppress the slightest acts likely to affect the security of the administration of justice. In order to establish a conspiracy of this kind, the prosecution must prove first the agreement, then the object of the agreement as laid, and the fact that the prisoner entered into an agreement for that specific purpose with at least one of the persons named. There is no room for a *cy-près* doctrine that something akin in design will suffice. Since the laying of the first information in October, 1957, the prosecution deemed it necessary to evolve thirty-six different charges to try to deal with the facts as they hoped to present them. Therefore, though the indictment may in form have related to one conspiracy only, the jury must have believed, after hearing the whole of the evidence for the prosecution, that they were being asked to deal with a number of different conspiracies.

The Solicitor-General (*Sir Harry Hylton-Foster*, Q.C.) (*Gerald Howard*, Q.C., and *A. P. Babington* with him), for the Crown. The Crown decided to proceed on the one count charging one conspiracy, without including any other counts in the indictment, so as to avoid the risk of any possible confusion. The count gave a fair portrait of the whole case and certainly was not so framed with any sinister motive or with the object of giving any unfair advantage to the Crown.

The Lord Chief Justice: The three appellants in this case were convicted before Donovan J. on an indictment in the following terms; the statement of offence was: "Conspiracy to obstruct the course of public justice"; the particulars of offence were that the appellants and two others, one of whom was Charles Field William Ridge, Chief Constable of Brighton, both of whom were acquitted, "between the first day of January, 1949, and the eighteenth day of October, 1957, in the County Borough of Brighton, conspired together and with other persons unknown to obstruct the course of public justice, in that the said Trevor Ernest Heath, John Richard Hammersley and Charles Field William Ridge should act contrary to their public duty as police officers in relation to the

1958
May 12

JOHN RICHARD HAMMERSLEY, TREVOR ERNEST HEATH, SAMUEL BELLSON

Goddard L.C.J., Cassels J., Diplock J.

administration of the law." They had been brought before the justices and committed for trial on a charge that "between the first of January, 1949, and the eighteenth of October, 1957, they did conspire together and with other persons unknown corruptly to solicit and obtain rewards for the said Charles Field William Ridge, John Richard Hammersley and Trevor Ernest Heath for showing or promising favours contrary to their duty as police officers and thereby to obstruct and defeat the course of public justice, contrary to common law."

The first point that has been taken on their behalf is that the indictment which was preferred was a bad indictment because it did not follow the committal and did not come within the words of the Indictments Act, 1915. The first thing we have to consider is the provisions of the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 (2) of which provides: "Subject as hereinafter provided no bill of indictment charging any person with an indictable offence shall be preferred unless either (a) the person charged has been committed for trial for the offence; or (b) the bill is preferred by the direction or with the consent of a judge of the High Court or pursuant to an order made under section 9 of the Perjury Act, 1911: Provided that (i) where the person charged has been committed for trial, the bill of indictment against him may include, either in substitution for or in addition to counts charging the offence for which he was committed, any counts founded on facts or evidence disclosed in any examination or deposition taken before a justice in his presence, being counts which may lawfully be joined in the same indictment."

Before I go on to deal with the point which has been raised specifically I will refer to the Indictments Act, 1915, which amended and very considerably altered the law as it existed before that date, and section 3 of the Indictments Act provides: "Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge." The statement of the

1958
May 12

JOHN RICHARD HAMMERSLEY, TREVOR ERNEST HEATH, SAMUEL BELLSON

Goddard L.C.J., Cassels J., Diplock J.

offence here is the conspiracy, which is a crime at common law. The particulars given are those I have just read out, that the defendants conspired to obstruct the course of public justice in that the three named defendants should act contrary to their public duty as police officers in relation to the administration of the law. It is said that there was nothing to justify the learned judge in allowing that indictment to be preferred because it was a different conspiracy from that on which the justices had committed. The fallacy which, in our opinion, underlines the argument which has been addressed to us is that it does not distingush between the conspiracy and the overt acts which may be given as evidence of the conspiracy. The law is conveniently and I think accurately stated in Professor Kenny's book on the Criminal Law, (1952) 17th edition at p. 395 by Mr. Cecil Turner, in which the learned author states it in this way: " For it rarely happens that the actual fact of the conspiring can be proved by direct evidence, since such agreements are usually entered into both swiftly and secretly."

In considering whether the learned judge was justified in allowing this indictment, which differs, as I say, in form from the caption of the depositions on which the prisoners were committed, it is necessary to get a picture of what was the conspiracy. The first thing to remember is that Ridge, who was acquitted, but to whom I must refer for this purpose, was the Chief Constable of the Brighton Police. Hammersley was an inspector in the same department of the police, and Heath was one of his detective-sergeants. It is said that those three men over a long period and in a great number of cases were corruptly taking rewards from people either to hinder prosecutions or to give what is generally called a " tip off " when prosecutions were being contemplated or might be contemplated. The real conspiracy alleged here is this, that these three defendants agreed among themselves that they would indulge in this course of conduct, no doubt for the purpose of enriching themselves, as it did, and, being three people in the police force who ought to be detecting crimes and bringing them before the courts, were detecting crimes and not bringing them before the courts. If these men had been acting honestly, in the case of Heath who seems to have been involved in more cases, his duty would have been to report it to Hammersley and Hammersley to Ridge, and those cases should have been brought before justices with a view to the offenders being tried by the justices or committed for trial. Instead of that, the prosecution showed that over a long period these men sometimes alone, sometimes together, were interviewing persons who were charged with offences and taking money from them when other police forces were inquiring or certain persons were in their district wanting to interview them and telling those police officers that the persons were not there. In other words, they were agreeing that they should go their own way, and that they should defeat public justice by doing these acts and not bringing these persons before the courts, but for their own benefit compounding these offences. That is the conspiracy: "We will not do our duty as we ought to do and therefore we will not report to our superior officers, but we will keep these things to ourselves," and whether they shared the results of what they got afterwards does not matter. These defendants were, on the evidence which the jury accepted, interviewing suspected criminals, in some cases actual criminals, and saying that for considerations they would not bring charges or they would help them when charges were brought or they would prevent them from being arrested by other police forces.

That is the picture of the conspiracy which the depositions disclose, and therefore it seems to the court that the particulars which were given in the indictment here do properly disclose the conspiracy with which these defendants were charged and do not show a series of conspiracies. They show one conspiracy, the one conspiracy being that these three defendants, all of whom were in the Detective Department of the Brighton Police, should act in this way for their own benefit instead of bringing the cases to justice. Of course, that might involve that in so doing they would have to enter into illegal agreements with persons outside. For instance, one of the main cases produced was that there was a man named Waite who, according to the evidence, was carrying on a large business of receiving stolen goods, and agreement was made with Waite not to prosecute provided he would give the police information with regard to thefts committed in Brighton, and they said: "If you do that, we shall not bother about your receiving stolen goods that have been stolen outside Brighton." The object of that agreement was that if he gave information with regard to thieves offering to him as a receiver goods that had been stolen in Brighton, then the police could make it appear to the public and the Watch Committee that they were acting perfectly properly and were zealous police officers by prosecuting those persons. The case against them was that the agreement between them and Waite was: "You must tell us of the offences being committed in Brighton, and those we shall prosecute, and if you do that, we shall not bother about all the property that may be stolen outside Brighton." The evidence showed that when the British Transport Commission police were inquiring into a very big theft, every conceivable difficulty was put by these persons in the way of the British Transport Commission police.

It seems to the court that once it is understood what was the nature of the conspiracy, the overt acts do not show different conspiracies. The evidence shows the overt acts which were carried out in accordance with the conspiracy, and the jury from those overt acts were entitled to assume that these persons had made an agreement between themselves of the nature I have stated. Otherwise it is impossible to believe that criminals who were receiving stolen goods and running illegal clubs in Brighton could have carried on these activities without somebody in the Criminal Investigation Department knowing about it. But if all the persons who ought to know about it were in league one with the other that there should not be prosecutions provided bribes were being given to them, then, of course, public justice was obstructed in the way which I have described. Bellson was an outsider in the sense that he was not a police officer, but he, as the depositions disclosed, was an informant. He was telling the police or introducing people to the police officers and therefore he was helping them in their illegal methods. In the opinion of the court, there was abundant evidence on the depositions to disclose the class of conspiracy to which I have referred. Therefore, we cannot say that there is any objection to the conspiracy which was charged being charged, and it was charged in a way that was perfectly right.

There is one other matter. Complaint was made that this was unfair to the defendants because they would not know what the charges were. As a matter of fact, the Solicitor-General had preferred lengthy particulars, which were handed to the defendants, stating exactly the cases that were going to be brought against them, and it is no objection to say that those were not part of the indictment. The indictment contained sufficient particulars in the sense that it stated what was the nature of the conspiracy, that is, a conspiracy to obstruct the course of justice, and that the defendants should act contrary to their public duty as police officers in relation to the administration of the law. The particulars which the Solicitor-General caused to be delivered to the defendants were particulars of the overt acts which were going to be given in evidence against them. In addition to that, for days and days this case had been before the justices in the presence of the defendants and their advisers, and they knew perfectly well the overt acts which were going to be charged.

Mr. Durand put his case on behalf of Bellson somewhat differently. His point of law was that the learned judge at the close of the case for the prosecution should have ruled that there was no case to go to the jury because the indictment disclosed more conspiracies than one; but exactly the same reasons apply in his case for rejecting that argument. In our opinion, the evidence proved one conspiracy, a conspiracy based on a large number of overt acts, but the conspiracy was to allow criminals in Brighton to conduct their criminal activities provided they approached the police, and not to report the matters in the way in which they ought to have done, and not to arrest or bring the criminals to justice.

The cases which Mr. Edward Clarke cited to the court seem really, with all respect to him, to be authorities against him and not authorities in his favour, because they were all cases in which the court did not quash the indictment although the indictment contained somewhat meagre particulars. In no cases were the indictments quashed, but it was said that particulars could be delivered and if particulars could be delivered to prevent any failure of justice before the Indictments Act, 1915, *a fortiori* they could be delivered and have been delivered since. But the case which it did seem to the court might have been cited, because it is very much in point, is MEYRICK AND RIBUFFI (1929) 21 Cr.App.R. 94. At p. 99 the Lord Chief Justice (Lord Hewart), delivering the judgment of the court, cited MULCAHY'S CASE (1868) L.R. 3 H.L. 306, at p. 317 and referred to what was said by Grose J. in BRISAC (1803) 4 East 164, at p. 171: "and so far as proof goes, conspiracy is generally 'matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.'" Then the judgment goes on to cite PARNELL (1881) 14 Cox 508, where Fitzgerald J., having cited those words, said (at p. 515): "It may be that the alleged conspirators have never seen each other, and have never corresponded. One may have never heard the name of the other, and yet by the law they may be parties to the same common criminal agreement." That is just what happened here, although the parties did see each other. It is a case of the common criminal agreement, "We will not prosecute those people who pay us not to do so."

That is enough to indicate that, in the opinion of the court, there is nothing in the point that this indictment is bad or that the learned judge should have held at the end of the case for the prosecution that there was no case to go to the jury. For these reasons the appeals are dismissed.

The rest of the matters which are contained in the notices are matters which it will be necessary for the court to consider

1958
May 12

JOHN RICHARD HAMMERSLEY, TREVOR ERNEST HEATH, SAMUEL BELLSON

Goddard L.C.J., Cassels J., Diplock J.

if an application is made for leave to appeal on questions of fact or misdirection arising out of the facts, and those we will hear tomorrow.

Appeals dismissed.

[On May 13, the court treated the applications in respect of these matters as final appeals, and dismissed the appeals both against conviction and sentence.]

Solicitors: John Hay & Chapman-Walkers, Brighton, for the appellant Hammersley; Cyril H. Chapman, Brighton, for the appellant Bellson.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE DIPLOCK

1958
May 14

EDWARD GEORGE MARLEY

Statutory Declaration—Goods Stolen when in Possession of British Transport Commission—Proof of Dispatch of Goods—Declarant to State Goods Handed to Commission by him or some Person in his Presence—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 41 (3).

Where the prosecution are relying on a statutory declaration under section 41 (3) of the Criminal Justice Act, 1948, to prove the dispatch of goods alleged to have been stolen when in the possession of the British Transport Commission, it is not sufficient that the declaration should state that the goods were packed up and that the parcel containing them was addressed and labelled by or in the presence of the declarant, and that the goods were handed to the Commission. If the declarant is able to do so, he should state that the goods were handed to the Commission by him or by some person in his presence; otherwise the person who handed the goods to the Commission ought also to make a declaration.

1958
May 14

EDWARD
GEORGE
MARLEY

Goddard
L.C.J.,
Cassels J.,
Diplock J.

Appeal against conviction.

The appellant was convicted at Surrey Quarter Sessions on February 12, 1958, of larceny of goods in the possession of the British Transport Commission and was sentenced by the Deputy Chairman to eighteen months' imprisonment.

A variety of goods had been packed and sent off by different firms in Nottingham to addresses in Surrey and in the ordinary course of transport were in the possession of the British Transport Commission at Bricklayers' Arms Goods Station. They were stolen by the appellant therefrom. To prove dispatch and non-receipt of the goods the British Transport Commission police prepared a number of statutory declarations, which were practically word for word the same in all material parts. The declarations were made by the packers and in all cases but one were in the following form " On . . . I packed into a parcel . . . This parcel was addressed by means of a . . . label to . . . It was handed to British Railways the same day for conveyance by rail to destination." In the remaining case the word " I handed " appeared instead of the words " it was handed." At the trial objection was taken to the admissibility of the declarations in evidence, but, after hearing argument in the absence of the jury, the Deputy Chairman ruled that they were admissible.

E. Lewis Langdon, for the appellant.
M. Corkrey for the Crown.

THE LORD CHIEF JUSTICE [after referring to the facts:] The only real point in the case is one taken by Mr. Langdon on which it is necessary for the court to say a word, because it deals for the first time with a most useful provision in the Criminal Justice Act, 1948, to prevent the necessity of having to call witnesses from all over the country to trace goods which have been stolen in the course of transit or at the place of destination. Section 41 (3) provides: " In any proceedings for an offence consisting of the stealing of goods in the possession of the British Transport Commission or any executive (other than the Hotels Executive) constituted under section 5 of the Transport Act, 1947, or of receiving goods so stolen knowing them to have been stolen, or for an offence under section 12 or section 18 or section 33 (2) of the Larceny Act, 1916, or sections 50 to 56 of the Post Office Act, 1908 [*rep.* see now Post Office Act, 1953, ss. 52–58], a statutory declaration made by any person (a) that he despatched or received or failed to receive any goods or postal packet or that any goods or postal packet when dispatched or received by him were in a particular state or condition; or (b) that a vessel, vehicle or aircraft was at any time employed by or under the Post Office for the transmission of postal packets under contract, shall be admissible as evidence of the facts stated in the declaration."

In this case most of the statutory declarations are in the same handwriting and are practically word for word the same in all material parts and have obviously been quite properly prepared by the railway police. The persons who make the declarations are, for the most part, packers who prove the preparation of the parcels, which is part of the dispatching. They describe the packing up, the addressing and labelling of the parcel and set out in each case its contents and value. Then they say that the parcel was handed to the British Transport Commission for conveyance. In one case the declaration says: "I handed it." If he handed it, that is all right, but otherwise either the declaration ought to say "I saw it handed to the British Transport Commission" or the person who actually handed it to the Commission ought also to make a declaration. One might say that that is almost an unnecessary formality because the parcel is packed for dispatch. It is proved to have got into the possession of the British Transport Commission, because a representative of the Commission gives evidence, as in this case, that the parcel was collected at the station. Where, however, evidence by statutory declarations instead of oral evidence in court is allowed to be given, it is most important that there should be compliance with the exact terms of the statute. Therefore, the proper course would be for somebody to declare of his knowledge that the goods were handed either by him or by some person in his presence to the British Transport Commission.

There is, therefore, a hiatus in these statutory declarations, but it is not a hiatus which the court will allow to set aside a very proper conviction for an extremely clever theft. We shall apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, which allows the court to decide the appeal in favour of the appellant, but nevertheless to dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred. Nobody could have any doubt that no substantial miscarriage of justice has actually occurred or that the appellant was a party to the stealing of the goods which were in the possession of the British Transport Commission. I have said what I have with the assent of the other members of the court, so that the Commission may see in future that the statutory declarations quite clearly state that the goods were handed by the declarant or by some person in his presence to the Commission.

We shall apply the proviso in this case, and dismiss the appeal.

Appeal dismissed.

Solicitor: The Solicitor, British Transport Commission, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BARRY
AND MR. JUSTICE ASHWORTH

1958
June 9, 23

GEORGE EDWARD NOSEDA
MICHAEL FREDERICK FIELD
JOHN KNIGHT
GEORGE PETER FITZPATRICK

Sentence—Borstal Training—Second or Third Sentences—Principles Applicable

There is no general principle applicable to all cases under which a second or third sentence of Borstal training is to be regarded either as appropriate or inappropriate. Each case must be considered on its own particular facts, but occasions on which a third sentence is appropriate are likely to be rare.

The first factor to consider is whether the offender is (a) a person released from Borstal on licence, or (b) an absconder from Borstal, or (c) a person who has remained absent without leave from Borstal. In case (a) the court should ascertain what period of his original training is outstanding in the event of his being recalled, and whether in fact he will be recalled, to Borstal. For a person in this class, as a general rule, the appropriate order in the case of an offence committed while released on licence is a short term of imprisonment with a view to recall to Borstal, unless the Prison Commissioners indicate that the offender will not be recalled, or the further offence is of so serious a nature as to require a substantial sentence. On the other hand, if the Prison Commissioners report that the offender made a good response to Borstal training, but appears to need a longer period of training than the remaining part of his Borstal sentence would provide, a further sentence of Borstal training may be appropriate. In cases (b) and (c), if the absconding or absence and the further offence take place within the early period, *i.e.*, the first twelve months or so of the original Borstal sentence, a short term of imprisonment with a view to recall is desirable. On the other hand, if an offender absconds or absents himself after undergoing more than twelve months of Borstal training and then commits an offence, the court may take the view that further Borstal training is unlikely to be of benefit and that imprisonment is the only alternative.

Appeals against sentence.

The appellants Noseda and Field were convicted at Middlesex Quarter Sessions on March 6, 1958, of housebreaking and larceny and taking and driving away a motor-car without the owner's consent (two other offences being taken into consideration); the appellant Knight at Surrey Quarter Sessions on March 21, 1958, of taking and driving away a motor-car without the owner's consent and of possessing housebreaking implements by night and at the County of London Quarter Sessions on March 27, 1958, of shopbreaking and larceny and of taking and driving away a motor-car without the owner's consent; the appellant Fitzpatrick at Salford Quarter Sessions on March 28, 1958, of attempted burglary, possessing housebreaking implements by night, and of housebreaking and larceny (one other offence being taken into consideration). In each case a sentence of Borstal training was passed. In the case of the appellants Noseda and Knight the sentence was the third sentence of Borstal training; in the case of the appellants Field and Fitzpatrick, the second. The antecedents of the appellants are summarised in the judgment.

No counsel appeared.

Cur. adv. vult.

THE LORD CHIEF JUSTICE: In each of these cases leave had been granted to the appellant to appeal from an order made by a court of quarter sessions that he should be sent to Borstal for training and in each case a similar order had been made by a court on a previous occasion. The question which arises in each case is whether it is desirable that a person should be sent to Borstal for training on a second, or possibly a third, occasion, and as this is a problem which quite frequently arises, the court decided to determine the appeals, but to put into writing the reasons for its decision, in the hope that they may be of some guidance to courts which are required to deal with similar problems in the future.

In the first place, although it is hardly necessary to say so, each case must be considered on its own particular facts, and there is no general principle applicable to all cases under which a second or indeed a third sentence of Borstal training is to be regarded either as appropriate or inappropriate. The most that can be said is that the occasions on which a third sentence is appropriate are likely to be rare.

In our view, the first factor to consider is whether the offender is (a) a person who had been released from Borstal on licence, or (b) an absconder from Borstal, or (c) a person who had remained absent without leave from Borstal, for example, after a visit to his home.

(a) We deal first with the case of a person released from Borstal on licence. He may fairly be said to have shown some response to his training and is prima facie in a different class from a person who either absconds from Borstal or is absent without leave. When a person is released from Borstal on licence, he is liable to recall to Borstal to complete his training and under section 45 (3) of the Prison Act, 1952, remains so liable for a period of four years from the date of his sentence. Then he may be detained till the expiration of three years from the date of his sentence or for a period of six months from the date when he is taken into custody under the order of recall, whichever is the later. If such a person commits an offence or offences while on licence and is brought before a court which has jurisdiction to send him to Borstal, it is, in our view, important that the court should know what period of his original training is outstanding in the event of his being recalled to Borstal and whether he will in fact be recalled to Borstal. As we understand it, the practice of the Prison Commissioners is to recall to Borstal a person who has committed an offence while released on licence, unless the court imposes a fresh sentence of Borstal or imposes a substantial sentence of imprisonment.

For a person in this class we think that, as a general rule, the appropriate order in respect of the offence committed by him while released on licence is a short term of imprisonment with a view to his recall to Borstal. The short sentence of imprisonment is required so that he may be detained in custody pending his recall to Borstal and, in passing sentence, the court should make it clear that recall to Borstal is intended. This course would not, however, be appropriate if the Prison Commissioners indicate that the accused person would not be recalled to Borstal. Nor would recall be appropriate if the nature of the further offence was so serious as to call for a substantial sentence. On the other hand, if the Commissioners report that the offender did make a good response to training but appears to need a longer period of training than the remaining part of his sentence would provide, a further sentence of Borstal may be appropriate.

(b) A person who absconds from Borstal thereby indicates his unwillingness to respond to the discipline and training provided in Borstal, but that is not of itself a valid reason why he should not be required to submit to them. If an absconder is brought before a court for a further offence committed while at large, we think that if the absconding and further offence take place early in his training, say within twelve months or so of the original sentence, a short term of imprisonment with a view to recall is desirable. We assume that in such cases absconders will be sent to the correction centre before resuming training. On the other hand, if the person absconds after undergoing more than twelve months of training and commits an offence, the court which has to deal with him, or the Prison Commissioners, may take the view that further Borstal training is unlikely to be of benefit and accordingly that imprisonment is the only alternative.

(c) A person who is absent without leave from Borstal and commits a further offence should ordinarily be treated as an absconder.

Before preparing this judgment the court has had the advantage of ascertaining the practice of the Commissioners in regard to these varying types.

The first two appeals before us were those of Noseda and Field, and they were heard together. Noseda is now twenty years of age and Field nineteen. Noseda was first sent to Borstal in May, 1955, and was released on licence in November, 1956. In April, 1957, he was again sentenced to Borstal and in January, 1958, he absconded with Field and in his company committed four offences for which he received, in March, 1958, a third sentence of Borstal training. Field was first sent to Borstal in January, 1957, and after absconding and being recaptured he absconded again with Noseda in January, 1958. Having regard to the ages and histories of these two appellants, and having considered the Prison Commissioners' reports on them, we decided that a further period

1958
June 9, 23

GEORGE EDWARD NOSEDA, MICHAEL FREDERICK FIELD, JOHN KNIGHT, GEORGE PETER FITZPATRICK

Goddard L.C.J., Barry J., Ashworth J.

of Borstal training was not likely to be of value and accordingly we substituted in respect of each of them a sentence of eighteen months' imprisonment.

The appellant Knight is eighteen years of age and was first sent to Borstal in January, 1957. He absconded in May, 1957, but was recaptured. In January, 1958, after completing twelve months of his sentence, he failed to return from home leave and committed over twenty offences. In March, 1958, he received a fresh sentence of Borstal training at Surrey Quarter Sessions for offences committed in that county and six days later he also received a sentence of Borstal training at the County of London Quarter Sessions for offences committed in that county. In our view, the course taken by Surrey Quarter Sessions was entirely justified and, although in the circumstances the third sentence of Borstal training passed at the County of London Sessions was, in a sense, unnecessary, we saw no reason to alter it and dismissed the appeal.

The appellant Fitzpatrick is nineteen and was first sent to Borstal in January, 1956. He was released on licence in September, 1957, but in February, 1958, he committed further offences and was again sentenced to Borstal training. In our view, this is a case in which completion of the original Borstal training should be enforced and accordingly we substituted a sentence of three months' imprisonment with a view to the appellant's recall to Borstal.

Sentences varied in the case of the first, second and fourth appellants.
Appeal dismissed in the case of the third appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BARRY
AND MR. JUSTICE ASHWORTH

GEORGE JOHNSTON ADAIR

1958
June 16, 23

Jury—Question After Retirement—When Further Direction Required.

Verdict — Substitution — Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 5 (2).

Where a jury, after retirement, return and put a question to the court and the form of the question indicates an approach to the issue different from that which was put forward by the Crown, it is not necessary in every case by way of further direction to review all the evidence relevant to the points involved in the question; but if the form of question shows that the jury appear to be assuming facts or drawing inferences of which there was no supporting evidence, further direction is called for and they should be reminded how far the relevant evidence went.

The appellant was charged with burglary and larceny, and, alternatively, with receiving part of the stolen property. Counsel for the Crown had invited the jury to convict of burglary and larceny on the basis that the appellant had himself broken and entered the premises named. No suggestion was made that he should be convicted on the basis that, while not taking part in the actual burglary, he had organised or assisted in it and thereby became an accessory before the fact, and the summing-up contained no reference to this point. The jury, after retirement, returned and put this question to the court: "If [the appellant] in fact remained at [his flat], but organised the breaking-in of the [premises named], put pressure on someone to carry out the breaking and supplied a key or other equipment, could [he] be found guilty of burglariously breaking and entering the premises?" The judge replied: "The answer is, he is an accessory before the fact and the short answer is 'Yes.'" The jury convicted on the count charging burglary and larceny and were discharged from giving a verdict on the count which charged receiving.

Held, that in the circumstances a fuller direction was called for and on this ground the conviction on the count which charged burglary and larceny could not be upheld, but that the court, exercising its powers under s. 5 (2) of the Criminal Appeal Act, 1907, would substitute a verdict of Guilty of receiving.

1958
June 16, 23

GEORGE JOHNSTON ADAIR

Goddard L.C.J.,
Barry J.,
Ashworth J.

Appeal against conviction.

The appellant was convicted at the County of London Quarter Sessions on March 14, 1958, of burglary and larceny and was sentenced by the Deputy-Chairman (F. H. Cassels, Esq.) to eighteen months' imprisonment. On a second and alternative count for receiving the jury were discharged from giving a verdict so far as the appellant was concerned. On a third count, which charged a different offence of receiving, the appellant was convicted, but did not appeal against the conviction on that count. The appellant was charged jointly with a woman named Farin, who was convicted of receiving on the second count.

The incident out of which the charge in the first count arose occurred in the night of December 8–9, 1957, when the Royal Oak public house was entered and cigarettes and liquor stolen. Counsel for the Crown had invited the jury to convict the appellant and the woman Farin on that count on the basis that they had themselves broken and entered the Royal Oak. No suggestion was made that he had organised or assisted in the crime and was liable to be convicted as an accessory before the fact, and the summing-up contained no reference to that point. After two hours the jury returned desiring further direction on a point of law as follows: "If Adair in fact remained at [his flat], but organised the breaking-in . . . put pressure on someone to carry out the breaking and supplied a key or other equipment, could Adair be found guilty of burglariously breaking and entering the premises?" The deputy chairman replied: "The answer is, he is an accessory before the fact and the short answer is 'Yes.'" After a very short retirement the jury returned a verdict of Guilty on the first and third counts.

F. H. Lawton, Q.C., and *C. G. L. Du Cann*, for the Appellant.

H. F. Cassel, for the Crown.

The arguments appear sufficiently from the judgment.

Cur. adv. vult.

1958
June 16, 23

GEORGE JOHNSTON ADAIR

Goddard L.C.J., Barry J., Ashworth J.

June 23. The judgment of the court was read by:

ASHWORTH J.: This appellant was charged together with a woman named Farin at the adjourned Quarter Sessions for the County of London in an indictment containing three counts. In the first count they were jointly charged with breaking and entering a public house and stealing over 80,000 cigarettes, nine bottles of whisky and five bottles of brandy; in the second count they were jointly charged with receiving 68,000 cigarettes, knowing them to have been stolen. In the third count they were jointly charged with receiving a wireless set, knowing it to have been stolen. The appellant was found Guilty on the first and third counts, while the woman Farin was found Not Guilty on those counts, but Guilty of receiving 500 cigarettes, which were found amongst her personal belongings. The appellant did not challenge the verdict or sentence on the third count, but contended that as a matter of law he was wrongly convicted on the first count.

The incident out of which the charge in the first count arose occurred in the night of December 8–9, 1957, when premises known as the Royal Oak public house were entered by means of a key which fitted one of the doors of the bar, and the cigarettes and liquor were stolen. On the following day police officers visited a flat occupied by the appellant and the woman Farin and there they found stacked round a gas stove cartons containing 68,000 cigarettes some of which could be identified as having come from the Royal Oak. They also found equipment suitable for making keys, including some plasticine bearing the impression of a key. The appellant's explanation to the police, which he repeated in his evidence at the trial, was that the cigarettes must have been deposited in the flat by a lodger named Bill, and that he, the appellant, had nothing whatever to do with the entry into the Royal Oak or the stealing therein. The key-making equipment was said by him to have been in his possession for amusement purposes only.

Counsel for the Crown invited the jury to convict the appellant and Farin on the first count on the basis that they had themselves broken and entered the Royal Oak. No suggestion was made that the appellant should be convicted on the basis that, while not taking part in the actual burglary, he had organised or assisted in the crime and was accordingly liable to be convicted as an accessory before the fact. In his summing-up the Deputy Chairman dealt fully and accurately with the law and the facts on the footing that the appellant was alleged to have broken and entered the premises himself. In the absence of any suggestion that the appellant might be convicted as an accessory it is not surprising that the summing-up contained no reference to that point.

The jury retired to consider their verdict and two hours later they returned, desiring further direction on a point of law which they expressed in the following terms: "If Adair in fact remained at 15, St. Luke's Road (his flat), but organised the breaking-in of the Royal Oak public house, put pressure on someone to carry out the breaking and supplied a key or other equipment, could Adair be found guilty of burglariously breaking and entering the premises?" The Deputy Chairman's reply was as follows: "The answer is, he is an accessory before the fact and the short answer is 'Yes.'" After a very short further retirement the jury returned a verdict of Guilty against the appellant on the first count.

Mr. Lawton contended for the appellant that, in the circumstances and having regard to the way in which the case for the Crown had been presented, the short further direction given by the Deputy Chairman was inadequate. He did not contend that if the three elements mentioned in the jury's question had been proved by evidence, namely, organisation, pressure and the supply of a key, the Deputy Chairman's answer would have been wrong in law. His contention was that there was no evidence whatever to support two of the elements, namely, organisation and pressure, and that the Deputy Chairman should have directed the jury that their approach to the problem involved assumptions which the Crown had not suggested and which were not supported by the evidence.

In our view, it would not be right to say that in every case where by the form of their question a jury indicate a different approach to the problem from that which was put forward on behalf of the Crown, it is necessary by way of further direction to review all the evidence relevant to the points involved in the jury's question. But if the form of the question shows that the jury appear to be assuming facts or drawing inferences for which there was no supporting evidence, further direction is called for and they should be reminded how far the relevant evidence went. In the present case there was certainly no evidence that the appellant put pressure on someone to carry out the breaking-in and it is not possible to say that, if the jury had been reminded of the absence of any such evidence, they would have convicted the appellant on the first count. While we have no wish to criticise the Deputy Chairman, who was confronted by a difficult question, we are of opinion that a fuller direction was called for than that contained in his short answer, and on this ground the conviction on the first count cannot be upheld.

Having regard to their verdict on the first count, the Deputy Chairman rightly discharged the jury from returning a verdict in respect of the appellant on the second count. The question now arises whether this court should substitute for the verdict of Guilty on the first count a verdict of Guilty on the second count, in pursuance of section 5 (2) of the Criminal Appeal Act, 1907. That subsection is in the following terms: " Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a

1958
June 16, 23

GEORGE JOHNSTON ADAIR

Goddard L.C.J., Barry J., Ashworth J.

sentence of greater severity." In the first place, it is clear that, as the jury were discharged from returning a verdict in respect of the appellant on the second count, there is no such obstacle to the application of section 5 (2) as existed in MELVIN & EDEN, 37 Cr.App.R. 1; [1953] 1 Q.B. 481. In that case the jury had acquitted the prisoners on a count for larceny and this court held that it had no power in the circumstances to substitute a verdict of Guilty of larceny, although the facts would certainly have warranted such a course. When subsection (2) of section 5 is invoked, the question arises whether it is clear to this court that the jury must have been satisfied of facts which proved the prisoner guilty of the other offence: see SMITH (1923) 17 Cr.App.R. 133, at p. 135.

In our view, it is plain from the terms of the jury's question and their subsequent verdict on the first count that they must have rejected the explanation offered by the appellant for his possession of the cigarettes and the key-making equipment. It is equally plain that they must have been satisfied that the appellant was directly implicated in the theft and that when the cigarettes came into his possession he must have known that they were stolen. Confirmation of this view is to be found in the fact that the jury convicted the woman Farin of receiving 500 cigarettes, which had been given to her by the appellant.

In these circumstances we think that the present case falls well within the ambit of section 5 (2) and accordingly we substitute for the verdict of Guilty on the first count a verdict of Guilty on the second count. The sentence of eighteen months' imprisonment which was passed in respect of the first count will stand as the sentence on the substituted verdict.

Verdict substituted.

Solicitors: Sampson & Co., for the appellant; The Solicitor, Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SLADE AND
MR. JUSTICE DEVLIN

LESLIE PILKINGTON

1958
June 23

Fraudulent Conversion — Indictment — Estate Agent — Moneys Alleged to have been Received on Behalf of Purchaser— Evidence of Receipt as Stakeholder and not as Agent of Vendor.

The appellant, an estate agent, was convicted of fraudulent conversion of sums of money alleged in the indictment to have been received by him for and on behalf of purchasers of houses. It was contended on his behalf that he was acting as agent for the vendor and not the purchaser in each case. The evidence showed that certain of the intending purchasers handed the appellant a sum of money on the terms that they were making offers of purchase subject to contract, and in other cases also subject to the condition that the appellant should secure a mortgage from the vendor for the intending purchaser.

Held, that there was ample evidence in all cases that the sums of money were paid to the appellant as stakeholder and not as agent for the vendor, and that the conviction must be affirmed.

NEWMAN (1882) 8 Q.B.D. 706 referred to.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on February 13, 1958, of fraudulent conversion and was sentenced by the Recorder of London to three years' imprisonment.

The appellant, an estate agent, was charged in a number of counts with fraudulent conversion of sums of money alleged to have been received by him for and on behalf of would-be purchasers of houses. In some cases the sum was handed to the appellant by the intending purchaser as a deposit, the purchaser stating that he was making the offer to purchase, subject to interest; in other cases, subject to the further condition that the appellant should secure for him a mortgage from the vendor. The appellant put the sums into his own pocket.

W. D. M. Sumner (*J. H. E. Mendl* with him), for the appellant.

The person defrauded in each case was the vendor and not the purchaser, and the appellant was acting as agent for the vendor and should have been so charged. The sums of moneys were received by the appellant on behalf of the vendor and not on behalf of the purchaser, and the indictment as framed was not supported by the evidence.

Christmas Humphreys (*J. H. Buzzard* and *Jean Southworth* with him), for the Crown, was not called on to argue.

THE LORD CHIEF JUSTICE: The appellant was convicted before the learned Recorder of London on an indictment containing a great number of counts. Some of the counts were alternative and he was convicted on seven counts charging him with fraudulently converting to his own use money received by him.

It is not contended that the appellant has any merits. It is not pretended that the appellant was not carrying on one of those fraudulent businesses of taking deposits from people who want to buy or obtain houses and putting the money into his own pocket, so that when the depositors asked for the money back it was not forthcoming. The appellant was an undischarged bankrupt. The only point that was made in the court below and in this court was that the wrong person has been named in the indictment as the person defrauded. It is said that the appellant was in fact receiving the money from the vendor, whereas the indictment alleges that the buyer has been defrauded.

Two of the cases seem clear beyond doubt. A 10 per cent. deposit was paid to the appellant by would-be purchasers

1958
June 23

LESLIE PILKINGTON

Goddard L.C.J., Slade J., Devlin J.

who were negotiating for property and made certain stipulations. The learned Recorder directed the jury that it was for them to decide what was the true nature of the transaction. He did not go on, as he might have done, to say that the inference was irresistible that the appellant was receiving the money as stakeholder. The person who says: " I am willing to negotiate and I will pay over some money to you, the agent, in order that it may be seen that I am a serious negotiator " of course intends to have his money back if there is no contract and, it may be, if there is no completion. The persons named in counts 10 and 14 paid their money down on the terms that the offer they were making was subject to contract. Surely, as the learned Recorder said, it was a question on which the jury had to come to a conclusion: what were the terms on which the money was paid and what was the capacity in which the appellant received it? The learned Recorder referred to the cases cited on page 706 of Archbold's *Criminal Pleading*, etc., 33rd ed., to which I need not refer, as authority for that proposition. When these persons paid their money to the appellant and said: " We are willing to negotiate and we give you some money as proof of our willingness to negotiate," they meant that, if no contract was concluded, they were to have their money back. Who else was to have it? The vendor would have no right to the money. The offer had been made to the vendor that, subject to a formal contract being signed, the house would be bought. There was no engagement on either side and the money had to be refunded. Instead of that the appellant kept the money, and, when the depositors asked for their money back, they did not get it.

The other cases in the indictment were different only to this extent, that the money was paid by a person who did not merely stipulate for a contract but also imposed a condition that the appellant should secure a mortgage, which is very much the same as the position in NEWMAN (1882) 8 Q.B.D. 706. The appellant never got the mortgage and never

1958
June 23

LESLIE PILKINGTON

Goddard L.C.J.,
Slade J.,
Devlin J.

intended to do so, never paid the money to the would-be vendors who put the property in his hands, but simply took and kept the money. There was evidence from the very facts themselves which would show that the jury were justified in finding that the money was not paid to his principals. It was paid to the appellant to hold in his hands till it was found out whether the transaction could go through either by a contract or a contract plus a mortgage being signed.

In these cases it seems to the court that the verdict of the jury was amply supported by the evidence and that the conviction must be affirmed. The appeal is dismissed.

Appeal dismissed.

Solicitor: R. W. Platt, for the appellant.

BEFORE

MR. JUSTICE DEVLIN, MR. JUSTICE DONOVAN AND
MR. JUSTICE ASHWORTH

1958
July 14

THOMAS GEORGE WICKINS

Road Traffic—Driving under Influence of Drink—Disqualification—Special Reason—Defendant Suffering from Diabetes, but not Aware of it—Alcohol not Sufficient to Affect Driving apart from Diabetes—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 15 (2).

The appellant pleaded Guilty to driving a motor-vehicle when under the influence of drink. At the time of the offence he was suffering from diabetes, though he was unaware of this, and had consumed a small quantity of beer not exceeding the amount to which he was normally accustomed, and an amount which would not have affected his driving but for the diabetes.

Held, that a " special reason " within the meaning of section 15 (2) of the Road Traffic Act, 1930, for not imposing disqualification was present.

1958
July 14

THOMAS GEORGE WICKINS

Devlin J.,
Donovan J.,
Ashworth J.

Dictum of Lord Goddard C.J. in WHITTALL *v.* KIRBY [1947] K.B. 194, at p. 201 followed and applied.

CHAPMAN *v.* O'HAGAN [1949] 2 All E.R. 690 considered.

Appeal against sentence.

The appellant pleaded Guilty at Bournemouth Quarter Sessions on May 12, 1958, to driving a motor-vehicle when under the influence of drink or drugs and was sentenced by the Recorder (N. R. Fox-Andrews, Esq.) to a fine of £5 and to an order disqualifying him from driving for twelve months.

The Recorder accepted the facts that at the time of the offence the appellant was suffering from diabetes, of which fact he was not aware, and that the small and usual quantity of beer which he had consumed would not have affected his driving but for the diabetes. He regarded the case as one of the least serious from the moral point of view, but felt obliged by the authorities to order disqualification.

N. R. Blaker, for the appellant.

The test is laid down in the words of the Lord Chief Justice (Lord Goddard) in WHITTALL *v.* KIRBY [1947] K.B. 194, at p. 201. Any reason which complies with the conditions there enunciated may be a " special reason " within section 15 (2) of the Act. CHAPMAN *v.* O'HAGAN [1949] 2 All E.R. 690 shows that this court will not disturb a finding where the inferior court has applied its mind to the correct considerations, though it may not agree with its conclusions. Here the appellant did not know that he had diabetes, and if he had not had diabetes, the offence would not have occurred.

Eric B. McLellan, for the Crown.

This is a difficult and border-line case. On the facts, diabetes must be " special to the offender " within the definition and not to the offence. In essence, the appellant is in no better a position than any other offender whose resistance to alcohol is unexpectedly lowered, *e.g.*, by tiredness or a cold. The appellant's ignorance of his condition is immaterial, as was the

1958
July 14

THOMAS
GEORGE
WICKINS

Devlin J.,
Donovan J.,
Ashworth J.

appellant's ignorance in KNOWLER *v.* RENNISON [1947] K.B. 488 that he was uninsured.

N. R. Blaker replied.

DEVLIN J.: This is an appeal from an order made by the Recorder of Bournemouth in which he imposed a sentence under section 15 (2) of the Road Traffic Act, 1930, of twelve months' disqualification because he considered that he was obliged by the authorities so to do. He puts the matter in this way in the very short and clear judgment which he gave when he invited the appellant to test the accuracy of his decision elsewhere: " In this case Mr. Thomas George Wickins pleads Guilty to an indictment which charges him with an offence, namely, that on December 26, 1957, in the County Borough of Bournemouth, when driving a motor-vehicle, he was under the influence of drink or drugs to such an extent as to be incapable of having proper control of the said vehicle." He then says he will inflict what he regards as a nominal penalty because he is satisfied that, morally speaking, this is one of the least serious cases of this type. He then continues: " It is urged upon me that on the evidence which has been given before me I am entitled under the provisions of subsection (2) of section 15 of the Road Traffic Act, 1930, to abstain from ordering that Mr. Wickins shall be disqualified under the terms of that section. My attention has been called to the case of CHAPMAN *v.* O'HAGAN [1949] 2 All E.R. 690. That case I have considered to the best of my ability and understanding. In this case I find the following facts: That on December 26, 1957, Mr. Wickins, who is admittedly a person of completely good character, was suffering from diabetes; and I find that he was not aware of that fact. I find that he consumed a quantity of beer which, but for the fact that he was suffering from that disease, would not have affected his ability to drive and properly control a motor-vehicle. It follows from his plea of Guilty that that amount of beer did in those circumstances render him incapable of having proper control of his motor-vehicle when he drove away, as he did, from the club at which he had been playing snooker. In all the circumstances of the case, if I thought that those findings of fact entitled me to say that there were 'special reasons' within the meaning of subsection (2) of section 15 of the Act of 1930, I would exercise my discretion in his favour and refrain from ordering disqualification. As I understand the other cases—other than CHAPMAN *v.* O'HAGAN (*supra*)—those findings of fact do not entitle me to say that there were 'special reasons' here. Accordingly, in my opinion, as a matter of law I am bound to order a period of disqualification for a period of not less than twelve months, and accordingly I make that order."

The first and the most important of the other cases to which the learned Recorder referred is WHITTALL *v.* KIRBY [1947] K.B. 194, in which the test was laid down by the Lord Chief Justice (Lord Goddard) at p. 201 in the following words: "A 'special reason' within the exception is one which is special to the facts of the particular case, that is, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the court ought properly to take into consideration when imposing punishment." If one takes the essence of that definition, there are four conditions there laid down which have to be satisfied. The first is that it must be a mitigating or an extenuating circumstance. There is no doubt about that here. The next is that it must not amount in law to a defence to the charge. Equally, that is the case here. The third is that it must be directly connected with the commission of the offence. In our judgment, the circumstances here are directly connected with the commission of the offence. If it had not been for the fact that the appellant was suffering from diabetes, the offence would not have been committed at all, because he had not taken sufficient drink to affect the mind of an ordinary man who was not suffering from that disease. The fourth is that the matter is one which the court ought properly to take into consideration when imposing

1958
July 14

THOMAS GEORGE WICKINS

Devlin J., Donovan J., Ashworth J.

punishment. That fourth condition is clearly satisfied here and, indeed, the Recorder did take it into consideration when he thought it right to impose what he described as a merely nominal penalty.

I need say no more about the case to which the learned Recorder refers, CHAPMAN *v.* O'HAGAN (*supra*), than that there is nothing in it to prevent the court from applying those provisions of the test which I read out from WHITTALL *v.* KIRBY (*supra*) in the way which I have indicated.

In those circumstances, we think that on this rather difficult point, because there is no doubt that this question of special reasons does raise some rather difficult points, the Recorder took the wrong view of the law. He makes it quite clear that, if he had taken the other view, he would have exercised his discretion and we think this is a case in which discretion ought to be exercised if the law permits it so to be done. Accordingly, we will allow the appeal and remove the order of disqualification.

Appeal allowed.

Solicitors: Marshall Harvey and Dalton, Bournemouth, for the Crown.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SLADE AND MR. JUSTICE DEVLIN

1958
July 4, 25

NATIONAL COAL BOARD *v.* GAMBLE

Aiding and Abetting—Driving of Vehicle with Excess Load—Lorry Weighed by Defendants' Servant and Found to be Carrying Excess Load—Load Offered to and Accepted by Driver on behalf of Purchaser—Weight Ticket Handed by Defendants' Servant to Driver—Passing of Property in Load—Motor

Vehicles (Construction and Use) Regulations, 1955 (*S.I.* 1955, *No.* 482), *regs.* 68, 104).

One M., the servant of a firm of hauliers, came to the defendants' colliery for the purpose of loading coal for a purchaser with whom the defendants had a running contract. M. took his empty lorry to a hopper operated by a servant of the defendants and coal was thereby loaded into the lorry until M. gave the order to stop. M. then took the lorry to the defendants' weighbridge. A servant of the defendants, one H., weighed the lorry and its load and informed M. that the load was substantially in excess of the permitted weight. He asked M. whether he intended taking the load, and on M. saying that he would risk it, H. made out the weight ticket required by section 21 of the Weights and Measures Act, 1889, to be delivered to the purchaser and handed it to M., who then drove off. The defendants were convicted at a magistrates' court of aiding and abetting the driving by M. of a heavy six-wheeled lorry on a highway, the weight of which exceeded the permitted weight, contrary to regulations 68 and 104 of the Motor Vehicle (Construction and Use) Regulations, 1955.

Held, (*per* Lord Goddard C.J. and Devlin J., Slade J. dissenting), that, as under sections 17 and 18 of the Sale of Goods Act, 1893, the property in the coal passed from the defendants to the purchaser only when the weight ticket was accepted by M. and as the defendants, therefore, completed the sale with the knowledge that M. was going then and there to drive the lorry on the highway with an excess load, the defendants were properly convicted of aiding and abetting.

BULLOCK (1954) 38 Cr.App.R. 151 followed.

Per Devlin J. A person who supplies, *i.e.,* gives, lends, sells, or otherwise transfers the right of property in an instrument for a crime or anything essential to its commission aids in the commission of it; and if he does so knowingly and with intent to aid, he abets it as well and becomes guilty of aiding and abetting. The *mens rea* requisite to constitute aiding and abetting is a matter of intent only, and does not depend on desire or motive.

Case stated by Derbyshire justices.

An information was preferred at Chapel-en-le-Frith magistrates' court by the respondent Gamble, a police officer, charging the appellants, the National Coal Board, with aiding and abetting the driving by one Mallender of a heavy six-wheeled motor-lorry on a highway, the weight of which with

1958
July 4, 25

NATIONAL COAL BOARD
v.
GAMBLE

Goddard L.C.J., Slade J., Devlin J.

its load exceeded 20 tons, contrary to regulations 68 and 104 of the Motor Vehicles (Construction and Use) Regulations, 1955.

The following facts were established at the hearing. On October 3, 1957, one Mallender, the servant of a firm of hauliers named H. Wilson & Sons (Mosboro) Ltd., came to the appellants' colliery at Somercotes for the purpose of loading coal and taking it to the Central Electricity Authority at Carrington, with whom the appellants had a running contract. Mallender took an empty lorry to a hopper operated by a servant of the appellants and coal was thereby discharged into the lorry until Mallender gave the order to stop. Mallender then took the lorry to the weighbridge. At the weighbridge office a notice was displayed warning owners and drivers of vehicles that the Board were not responsible for the use of any vehicle on a road which was loaded beyond its authorised capacity. The weighbridge operator, one Haslam, a servant of the appellants, weighed the lorry and its load and informed Mallender that the overweight of the load was 3 tons 18 cwt. He asked Mallender whether he intended taking the load, and on Mallender saying that he would risk it, made out the weight ticket required by section 21 of the Weights and Measures Act, 1889, and handed it to Mallender, who then drove off. No evidence was called by the appellants at the hearing. The vehicle was stopped by the police on the road, and as a result H. Wilson & Sons (Mosboro) Ltd. were convicted and fined.

The justices were of opinion that Haslam could and ought to have refused to hand over 15 tons 12 cwt. of coal to Mallender, knowing that Mallender proposed to use the coal in such a way as to break the law and that the handing over of the weight ticket in these circumstances constituted the offence of aiding and abetting and convicted and fined the appellants.

The appellants appealed.

1958
July 4, 25

NATIONAL COAL BOARD
v.
GAMBLE

Goddard L.C.J.,
Slade J.,
Devlin J.

John Thompson, Q.C., and *D. M. Cowley*, for the appellants.
P. Ashworth, for the respondent.

Cur. adv. vult.

July 25, 1958. The following judgments were read.

THE LORD CHIEF JUSTICE: This is a Special Case stated by justices for the County of Derby before whom the appellants, the National Coal Board, were charged with aiding and abetting the commission of an offence. The offence, succinctly stated, was driving a heavy six-wheeled motor lorry on a highway, the weight of which with its load exceeded 20 tons, contrary to regulations 68 and 104 of the Motor Vehicles (Construction and Use) Regulations, 1955.

The facts, which were not in dispute, were as follows: On October 3, 1957, one Mallender, the servant of a firm of hauliers called H. Wilson & Sons (Mosboro) Ltd., came to the appellants' colliery at Somercotes there to load coal and take it to the Central Electricity Authority at Carrington. The appellants apparently had a running contract with the Central Electricity Authority for the purchase of coal and Mallender was not sent to obtain any particular quantity, though no doubt he went to get a lorry load. He took his empty lorry to a hopper operated by a servant of the appellants and coal was then discharged thereby into his lorry and the discharge continued until Mallender gave orders to stop. Mallender then took his lorry to the weighbridge in order that the lorry might be weighed and the amount of coal ascertained. There is a notice displayed at the weighbridge office warning owners and drivers of vehicles that the Board are not responsible for the use of any vehicle on the road which is loaded beyond its authorised capacity. The presence of this notice is, in my opinion, immaterial for the purposes of this case, as, if an offence has been committed which the appellants have aided and abetted, the display of the notice can not protect them. The weighbridge operator, one Haslam, weighed the lorry and its load and informed Mallender that the load was nearly four tons over weight. In fact the actual over-weight was 3 tons 18 cwt. Mallender was asked by Haslam whether he intended taking this load and the former said that he would risk it and thereupon Haslam made out the weight ticket and gave it to Mallender, who then drove off.

By section 21 of the Weights and Measures Act, 1889, it was incumbent on the sellers to deliver to the purchaser or to his servant before any part of the coal was unloaded a weight ticket. It is possible for the weight tickets to be sent by post, but in fact the practice is to deliver them to the driver at the weighbridge. The weight ticket gave the weight of coal and the vehicle as 23 tons 18 cwt. It set out the tare weight of the lorry as 8 tons 6 cwt., accordingly showing the net weight of the coal as 15 tons 12 cwt. The vehicle was stopped by the police on the road and as a result H. Wilson & Sons (Mosboro) Ltd. were convicted and fined, and then information was laid against the appellants for aiding and abetting the commission of that offence. The justices were of opinion that Haslam could and ought to have refused to hand over to Mallender 15 tons 12 cwt. of coal, knowing that Mallender proposed to use the coal in such a way as to break the law, and were of opinion that the handing over of the weighbridge ticket in these circumstances constituted the offence of aiding and abetting.

In ACKROYDS AIR TRAVEL, LTD. *v.* D.P.P. [1950] 1 All E.R. 933, I stated the law with regard to aiding and abetting in this way (at p. 936): " A person could only be convicted . . . as an aider and abettor if he knew all the circumstances which constituted the offence. Whether he realised that those circumstances constituted an offence was immaterial. If he knew all the circumstances, and those circumstances constituted the offence, that was enough to convict him of being an aider and abettor," and Humphreys J., in the same case said (at p. 936): " It must be shown that the unlawful act has been committed, and, therefore, that the offence has been committed, and, further, that the person charged as an aider and abettor was aware of the facts sufficiently to enable him to know that the act was unlawful."

Now to enable one to decide whether the appellants were properly convicted as aiders and abettors it seems to me necessary to decide in the first instance when the property in the coal had passed. This was a sale of unascertained goods and the property in those goods passes on a sale when the parties intend it should pass and rules are set out in section 17 of the Sale of Goods Act, 1893, for enabling the court to determine when property passes, subject of course to the intention of the buyer and seller. In my opinion, it is quite clear that neither side could have intended the property in the coal to pass when it was put from the hopper into the lorry. The quantity would have to be ascertained in order to enable the price to be ascertained. The lorry is then taken to the weighbridge to be weighed and, in my opinion, no sale takes place whereby the property is passed until the weighing is completed and assented to by the buyer and this is shown by the handing to him and the acceptance by him of a weighbridge ticket. In my opinion, therefore, no property passed until the weighbridge ticket was accepted by Mallender.

Now as soon as Haslam weighed the coal he knew it was over weight and called Mallender's attention to that fact. From Mallender's answer he knew that he intended to drive the over-weighted lorry on the highway and with that knowledge he completed the sale and handed the weight ticket to Mallender whose duty then was to give it to the purchasers, namely, the Central Electricity Authority. Haslam could, in my opinion, have refused to allow the over-weight amount of 3 tons 18 cwt. to leave the colliery. No specific amount had been asked for. The Board were no doubt bound to deliver coal to the Electricity Authority under their contract, but were not bound to deliver any particular amount of coal at any particular moment.

The justices drew the inference, and it was not disputed, that the Board were bound by contract to supply a bulk quantity of coal to the Authority. It was urged in this case on behalf of the Board that they had no right to require Mallender to unload the coal or rather the excess, but with this I cannot agree. For the reasons I have already given the property had not passed until the delivery was completed and it could only be completed by the weighing and the delivery and acceptance of the ticket.

Suppose a purchaser took his lorry to the hopper and asked for 10 tons of coal or the Coal Board had offered to supply him with 10 tons of coal. Nobody would know how much the hopper delivered until it had been weighed. If it was found that more than 10 tons had been put into the lorry, it seems to me beyond question that the Board could insist upon the excess being taken out. Here no specific amount was asked for, but the Board, by their servant, knew that more had been put into the lorry than could be lawfully carried on the road and with that knowledge completed the sale. In my opinion, that amounted to an aiding and abetting of the offence, as Haslam knew Mallender was going there and then to drive the lorry on the highway, in other words, a specific offence was contemplated.

In this connection I would refer to BULLOCK (1954) 38 Cr.App.R. 151, where LOMAS (1913) 9 Cr.App.R. 220, was distinguished. In so holding I do not think an undue burden is placed on the Coal Board; if their weighbridge operators are instructed to refuse to give a weight ticket to the driver of a lorry which with its load exceeds the permitted maximum and the latter nevertheless drives away with the load, the Board will not have aided or abetted the offence. Compliance with the requirements of the Weights and Measures Act can be made by posting the ticket to the purchaser. The Coal Board obviously desire to maintain that the overloading of customers' lorries is no concern of theirs, but in that I cannot agree. The object of the legislation is to protect the roads of the country from damage to which the Board would directly contribute if they allow excessive weight to be taken from their premises. In my opinion, the justices came to a right decision in point of law and I would dismiss this appeal.

I will now ask Devlin J. to read his judgment, and then I will read Slade J.'s dissenting judgment.

DEVLIN J.: A person who supplies the instrument for a crime or anything essential to its commission aids in the commission of it; and if he does so knowingly and with intent to aid, he abets it as well and is therefore guilty of aiding and abetting. I use the word "supplies" to comprehend giving, lending, selling or any other transfer of the right of property. In a sense, a man who gives up to a criminal a weapon which the latter has a right to demand from him aids in the commission of the crime as much as if he sold or lent the article. But this has never been held to be aiding in law: see LOMAS (1913) 9 Cr.App.R. 220, and BULLOCK, 38 Cr.App. R. 151. The reason, I think, is that in the former case there is in law a positive act and in the latter only a negative one. In the transfer of property there must be either a physical delivery or a positive act of assent to a taking. But a man who hands over to another his own property on demand, although he may physically be performing a positive act, in law is only refraining from detinue. Thus in law the former act is one of assistance voluntarily given and the latter is only a failure to prevent the commission of the crime by means of a forcible detention, which would not even be justified except in the case of felony. Another way of putting the point is to say that aiding and abetting is a crime that requires proof of *mens rea,* that is to say, of intention to aid as well as of knowledge of the circumstances, and that proof of the intent involves proof of a positive act of assistance voluntarily done.

These considerations make it necessary to determine at what point the property in the coal passed from the Board and what the Board's state of knowledge was at that time. If the property had passed before the Board knew of the proposed crime, there was nothing they could legally do to prevent the driver of the lorry from taking the overloaded

1958
July 4, 25

NATIONAL COAL BOARD
v.
GAMBLE

Goddard L.C.J., Slade J., Devlin J.

lorry out onto the road. If it had not, then they sold the coal with knowledge that an offence was going to be committed.

The Board called no evidence, so that a good deal was left to inference; but the conclusions of fact reached by the magistrates have not been seriously disputed. The Board had an instalment contract with the Central Electricity Authority for a supply of coal to be delivered at the colliery into lorries sent by a carrier on behalf of the Authority. The quantity of each instalment was not prescribed and the inference is that the Board were to deliver and the carrier to receive as much as each lorry could carry (which means of course as much as it could legally and safely carry) until the contract quantity was exhausted. The method of delivery was for the lorry to be loaded by hopper and then to proceed to a weighbridge; there were off-loading facilities if the load was found to be over-weight. At the weighbridge a ticket was issued in accordance with the Weights and Measures Act, 1889, section 21, which provides that where any quantity of coal exceeding 2 cwt. is delivered by means of any vehicle to any purchaser, the seller of the coal shall deliver or send by post to the purchaser or his servant, before any part of the coal is unloaded, a ticket or note in the prescribed form.

On this occasion the carrier's lorry was driven by one Mallender and its maximum legal load (after allowing for the tare weight) was 11 tons 12 cwt. It was loaded at the hopper, Mallender telling the operator when to stop. Mallender then took the lorry to the weighbridge. The weighbridge operator, one Haslam, weighed the lorry and its load and informed Mallender that his load was nearly 4 tons over-weight. Haslam asked Mallender whether he intended taking the load and Mallender said he would risk it; he then took the weighbridge ticket from Haslam and left the colliery.

In these circumstances prima facie the property in the coal passed on delivery to the carrier in accordance with Rule 5 of section 18 of the Sale of Goods Act, 1893. If the delivery was complete after loading and before weighing, the Board

1958
July 4, 25

NATIONAL COAL BOARD
v.
GAMBLE

Goddard L.C.J.,
Slade J.,
Devlin J.

had not until after delivery any knowledge that an offence had been committed. But where weighing is necessary for the purpose of the contract, as for example in order to ascertain the price of an instalment, the property does not pass until the weight has been agreed. In SIMMONS *v.* SWIFT (1826) 9 B. & C. 857, the parties agreed to buy and sell "the bark stacked at Redbrook at £9 5s. 0d. per ton." It was held that the property did not pass until the bark had been weighed and the price ascertained. Bayley J. said at p. 863 that the concurrence of the seller in the act of weighing was necessary and he might insist on keeping possession until the bark had been weighed.

It was contended on behalf of the Board that Haslam had no option after weighing but to issue the ticket for the amount then in the lorry. I think that this contention is unsound. In the circumstances of this case the loading must be taken as subject to adjustment; otherwise, if the contract were for a limited amount, the seller might make an over-delivery or an under-delivery which could not thereafter be rectified and the carrier might be contractually compelled to carry away a load in excess of that legally permitted. I think that the delivery of the coal was not completed until after the ascertained weight had been assented to and some act was done signifying assent and passing the property. The property passed when Haslam asked Mallender whether he intended to take the load and Mallender said he would risk it and when the mutual assent was, as it were, sealed by the delivery and acceptance of the weighbridge ticket. Haslam could, therefore, after he knew of the overload have refused to transfer the property in the coal.

This is the conclusion to which the justices came. Mr. Thompson submits on behalf of the Board that it does not justify a finding of guilty of aiding and abetting. He submits, first, that even if knowledge of the illegal purpose had been acquired before delivery began, it would not be sufficient for the finding; and secondly, that if he is wrong about that, the knowledge was acquired too late, and the Board was not guilty of aiding and abetting simply because Haslam failed to stop the process of delivery after it had been initiated.

On his first point Mr. Thompson submits that the furnishing of an article essential to the crime with knowledge of the use to which it is to be put does not of itself constitute aiding and abetting; there must be proved in addition a purpose or motive of the defendant to further the crime or encourage the criminal. Otherwise, he submits, there is no *mens rea.* I have already said that, in my judgment, there must be proof of intent to aid. I would agree that proof that the article was knowingly supplied is not conclusive evidence of intent to aid. FRETWELL (1862) L. & C. 161 is authority for that. STEANE, 32 Cr.App.R. 61; [1947] 1 K.B. 997, in which the defendant was charged with having acted during the war with intent to assist the enemy contrary to the Defence Regulations then in force, makes the same point. But prima facie—and STEANE (*supra*) makes this clear also—a man is presumed to intend the natural and probable consequences of his acts and the consequence of supplying essential material is that assistance is given to the criminal. It is always open to the defendant, as in STEANE (*supra*), to give evidence of his real intention. But in this case the defence called no evidence. The prima facie presumption is therefore enough to justify the finding, unless it is the law that some other mental element besides intent is necessary to the offence.

This is what Mr. Thompson argues, and he describes the additional element as the purpose or motive of encouraging the crime. No doubt evidence of an interest in the crime or of an express purpose to assist it will greatly strengthen the case for the prosecution. But an indifference to the result of the crime does not of itself negative abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third man lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor. To hold otherwise would be to negative the rule that *mens rea* is a matter of intent only and does not depend on desire or motive.

The authorities, I think, support this conclusion, though none has been cited to us in which the point has been specifically argued and decided. The Lord Chief Justice has quoted the statement of the law in ACKROYDS *v.* D.P.P. [1950] 1 All E.R. 933, which is consistent with the results reached in the earlier cases of COOK *v.* STOCKWELL (1915) 84 L.J.K.B. 2187, and CAFFERATA *v.* WILSON [1936] 3 All E.R. 149, and with the later case of BULLOCK (*supra*). The same principle has been applied in civil cases where the seller has sued upon a contract for the supply of goods which he knew were to be used for an illegal purpose. In some of the authorities there is a suggestion that he could recover on the contract unless it appeared that in addition to knowledge of the purpose he had an interest in the venture and looked for payment to the proceeds of the crime. But in PEARCE *v.* BROOKS (1866) L.R. 1 Ex. 213, POLLOCK C.B., at p. 217, stated the law as follows: "I have always considered it as settled law, that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied. If, to create that incapacity, it was ever considered necessary that the price should be bargained or expected to be paid out of the fruits of the illegal act (which I do not stop to examine), that proposition has been overruled by the cases I have referred to, and has now ceased to be law."

The case chiefly relied on by Mr. Thompson was CONEY (1882) 8 Q.B.D. 534; 51 L.J.Q.B. 66. In this case the defendants were charged with aiding and abetting an illegal prize fight at which they had been present. The judgments all refer to "encouragement," but it would be wrong to conclude from that that proof of encouragement is necessary to every form of aiding and abetting. Presence on the scene of the crime without encouragement or assistance is no aid to the criminal; the supply of essential material is. Moreover, the

1958
July 4, 25

NATIONAL COAL BOARD
v.
GAMBLE

Goddard L.C.J., Slade J., Devlin J.

decision makes it clear that encouragement can be inferred from mere presence. Cave J., who gave the leading judgment, said of the summing-up at page 70 of the report in the *Law Journal Reports*: "It may mean either that mere presence unexplained is evidence of encouragement, and so of guilt, or that mere presence unexplained is conclusive proof of encouragement, and so of guilt. If the former is the correct meaning I concur in the law so laid down; if the latter, I am unable to do so." This dictum seems to me to support the view I have expressed. If voluntary presence is prima facie evidence of encouragement and therefore of aiding and abetting, it appears to me to be *a fortiori* that the intentional supply of an essential article must be prima facie evidence of aiding and abetting.

As to Mr. Thompson's alternative point, I have already expressed the view that the facts show an act of assent made by Haslam after knowledge of the proposed illegality and without which the property would not have passed. If some positive act to complete delivery is committed after knowledge of the illegality, the position in law must, I think, be just the same as if the knowledge had been obtained before the delivery had been begun. Of course, it is quite likely that Haslam was confused about the legal position and thought that he was not entitled to withhold the weighbridge ticket. There is no *mens rea* if the defendant is shown to have a genuine belief in the existence of circumstances which, if true, would negative an intention to aid; see WILSON *v.* INYANG [1951] 2 K.B. 799. But this argument, which might have been the most cogent available to the defence, cannot now be relied upon, because Haslam was not called to give evidence about what he thought or believed.

The fact that no evidence was called for the defence makes this case a peculiar one. We were told that the Board desired to obtain a decision on principle which would enable them to regulate their practice in the future. They therefore accepted responsibility for Haslam's act without going into any questions of vicarious liability; and they called no evidence in order, we were told, that the decision might be given on facts put against them as strongly as might be. What they wished to establish was that responsibility for overloaded lorries rested solely with the carrier and that the sale and delivery of the coal could not, if that was all that could be proved, involve them in a breach of the criminal law. For the reasons I have given I think that the law cannot be so stated and that the appeal should be dismissed.

THE LORD CHIEF JUSTICE: I will now read Slade J.'s dissenting judgment.

Before a person can be convicted of aiding and abetting the commission of an offence the prosecution must prove: (a) that he knew the essential matters which constituted the offence: JOHNSON *v.* YOUDEN [1950] 1 K.B. 544; FERGUSON *v.* WEAVING [1951] 1 K.B. 814; and (b) that with such knowledge he assisted, or at least encouraged, the principal offender to commit the offence. Mere passive acquiescence is sufficient only, I think, where the alleged aider and abettor has the power to control the offender and is actually present when the offence is committed: for example, the owner of a car sitting alongside his chauffeur when the latter commits an offence.

In my judgment, the words "assist" and "encourage" necessarily import motive, *i.e.*, purpose or object. It is not sufficient that the alleged abettor should be proved to have done some act, or to have made some omission, without which the principal offender could not have committed the offence; nor is it sufficient that such act or omission had the effect of facilitating the commission of the offence or that it in fact operated on the mind of the principal offender so as to decide him to commit it. The prosecution must prove that the act or omission upon which they rely as constituting the alleged aiding and abetting was done or made with a view to assisting or encouraging the principal offender to commit the offence or, in other words, with the motive of endorsing the commission of the offence.

The foregoing brings me to the facts found, the inferences drawn and the opinions expressed by the magistrates. Mr. Thompson, who appeared for the appellants, the National Coal Board, invited the court to identify the Board with their servant Haslam and, if the court thought Haslam had aided and abetted Mallender, the lorry driver (who was not the servant of the Board), to commit the offence, to treat the Board also as being answerable for Haslam's offence. As I have reached the conclusion that there was no evidence upon which the magistrates could find that Haslam had aided and abetted Mallender to commit the offence, I am prepared to deal with the appeal upon the basis of Mr. Thompson's invitation, though I should have felt doubtful of the court's jurisdiction to do so in a criminal charge had my opinion been otherwise.

I accept the opinion of the magistrates that the property in the coal taken from the hopper and loaded into the lorry did not pass from the Board to their customer, the Central Electricity Authority, until Haslam issued the weighbridge ticket to Mallender. It is, I think, clear that Haslam knew the essential matters which constituted Mallender's proposed offence when, but not until, he had weighed the coal. I do not think, however, that Haslam knew that it was the issue of the weigh ticket which operated to pass the property in the coal and thus to complete the sale of the coal to the Board's customer, and I regard this consideration as important in considering Haslam's motive in issuing the weigh ticket. It is highly improbable that Haslam was acquainted with the provisions of sections 17 and 18 of the Sale of Goods Act, 1893, for ascertaining the intention of the parties with regard to the passing of the property in the coal, or that he ever applied his mind to the question of the precise moment at which the property in the coal would thereby be deemed to have passed. I will, however, assume against Haslam that such knowledge must be imputed to him. I then ask myself what courses were open to Haslam when he learned, for the first time, (*i.e.*, on seeing the scale register the tare of the vehicle and the weight of the coal as in excess of 20 tons) the essential matters of the offence which he knew that Mallender intended to commit. Two courses only were open to him: (1) to call upon Mallender to off-load the coal, or so much of it as was necessary to reduce the total weight to 20 tons, and to refuse to issue a weigh ticket; or (2) to leave the coal where it was, thereby completing the sale, whereupon he would have to issue the weigh ticket in order to avoid contravening the requirements of section 21 of the Weights and Measures Act, 1889. Haslam chose the second of these alternatives, and it is his adoption of this choice which has been held by the magistrates to constitute the aiding and abetting of Mallender's offence.

If there were any evidence that Haslam's exercise of this choice was inspired by a desire to encourage Mallender to commit the offence (which Haslam knew Mallender intended to commit), I would agree with the magistrates' decision. Some acts or omissions speak for themselves; they are consistent only with a desire to encourage or assist. Other acts or omissions are quite colourless and no sinister inference can legitimately be drawn from them. The motive for these can only be supplied by other conduct, for example, where an otherwise equivocal act is accompanied by words of encouragement to commit the offence.

Mr. Thompson referred us to CONEY (1882) 8 Q.B.D. 534, and particularly to the judgment of Hawkins J., at pp. 557 *et seq.* CONEY'S case (*supra*) was considered by the Divisional Court in WILCOX *v.* JEFFERY [1951] 1 All E.R. 464, and both these cases seem to me to emphasise the importance of ascertaining the motive underlying an act or omission relied upon as constituting encouragement to another to commit an offence.

I do not think the magistrates applied their minds to the question whether Haslam issued the weigh ticket and thereby completed the sale for the purpose of, or with a view to, encouraging Mallender to commit the offence, or whether he did so with no such purpose in mind. Indeed if I am wrong in my view that the words "encourage" and "assist" necessarily import "motive," there is no reason why they should

1958
July 4, 25

NATIONAL COAL BOARD
v.
GAMBLE

Goddard L.C.J.,
Slade J.,
Devlin J.

have done so. None of the facts found by the magistrates is, in my judgment, capable of supporting the inference that Haslam, in making the choice he did, issued the weigh ticket and thereby completed the sale with a view to encouraging Mallender to commit the offence which Mallender informed him he intended to commit. On the contrary, I think the facts so found tend to negative rather than to support any such inference, for example, the large notice displayed by the appellants on the door of the weighbridge ticket office and the facts found in paragraph 4, sub-paragraphs (k) and (l) of the case; nor can I see any reason why Haslam should desire to encourage the commission of the offence.

Moreover, if knowledge is not to be imputed to Haslam as to the precise moment when the property in the coal passed to the Board's customers, I think Haslam was in a difficult position and may well have thought that he had no right to insist upon the off-loading of the excess coal, that Mallender might well have demurred to any such insistence, and that he, Haslam, could only have enforced his demand by taking the law into his own hands.

For these reasons I think that the question raised by the case should be answered in the negative, and that the conviction of the appellants should be quashed.

Appeal dismissed

Solicitors: Donald H. Haslam, agent for Lawrence C. Jenkins, Nottingham, for the appellants; Kingsford, Dorman & Co., agents for D. G. Gilman, Derby, for the respondent.

BEFORE

MR. JUSTICE DEVLIN, MR. JUSTICE DONOVAN AND
MR. JUSTICE ASHWORTH

FRANK CHAPMAN

1958
July 20, 28

Sexual Offence—Abduction of Girl under 18*—Meaning of "Unlawful Sexual Intercourse"—Sexual Offences Act*, 1956 (4 *&* 5 *Eliz.* 2, *c.* 69) *s.* 19.

By section 19 (1) of the Sexual Offences Act, 1956: "It is an offence . . . for a person to take an unmarried girl under the age of 18 out of the possession of her parent or guardian against his will, if she is so taken with the intention that she shall have unlawful sexual intercourse with men or with a particular man."

"Unlawful sexual intercourse" in the above subsection merely means illicit intercourse, *i.e.*, intercourse outside the bond of marriage.

Appeal against conviction.

The appellant was convicted at Hampshire Assizes on March 24, 1958, of abduction of an unmarried girl under the age of 18 and was sentenced by Stable J., to eighteen months' imprisonment.

The appellant, a married man, took an unmarried girl of the age of sixteen and a few months from her parents' house at Southampton, to Basingstoke, and had sexual intercourse with her there and subsequently at Winchester, from where she was brought home by the police. At the trial Stable J. directed the jury that "unlawful sexual intercourse" in section 19 (1) of the Sexual Offences Act, 1956, merely meant intercourse outside the bond of marriage.

I. A. Kennedy, for the appellant.

The judge's direction was wrong. The intercourse in the present case was not "unlawful" within the meaning of section

19 (1). By " unlawful intercourse " the subsection means intercourse which is forbidden by law, and as the girl in the present case was over 16, the intercourse was not forbidden by law. Alternatively unlawful intercourse connotes intercourse in such circumstances as would constitute the breach of a covenant in a lease, *e.g.*, intercourse in a house used as a brothel. The offence of taking an unmarried girl out of the possession and against the will of her father goes back to a statute passed in the reign of Philip and Mary, in which no particular intent was specified as constituting an ingredient of the offence. The language of the present Act appeared in section 7 of the Criminal Law Amendment Act, 1885, where the required intent was that the girl should be " unlawfully and carnally known," but that section appears never to have been the subject of judicial construction.

J. H. Inskip, for the Crown.

The judge's direction was right. The word " unlawful " is not used in any technical sense, and embraces any intercourse outside the bond of marriage.

At the close of the arguments Devlin J., said that the appeal would be dismissed, and that the court would put their reasons for their decision into writing at a later date.

Cur. adv. vult.

July 28, 1958, the judgment of the court was read by

DONOVAN J.: The judgment I am about to read is the judgment of the court.

The court has already dismissed this appeal for reasons which we now proceed to give. The appellant was convicted at Winchester Assizes on March 24, 1958, before Stable J., of an offence against section 19 of the Sexual Offences Act, 1956, (hereinafter called " the 1956 Act ") which so far as material reads as follows: " Subsection (1). It is an offence, subject to the exception mentioned in this section, for a person to take an unmarried girl under the age of eighteen out of the possession of her parent or guardian against his will, if she is so taken with the intention that she shall have unlawful sexual intercourse with men or with a particular man. (2) A person is not guilty of an offence under this section because he takes such a girl out of the possession of her parent or guardian as mentioned above, if he believes her to be of the age of eighteen or over and has reasonable cause for the belief."

The facts were that the appellant, a married man with four children, in December, 1957, took an unmarried girl aged sixteen and a few months away from her parents' house at Southampton to Basingstoke. There they stayed at his sister's house, slept together and had intercourse. He then took her to Winchester to the house of another of his sisters to whom he introduced her as his wife. From Winchester the girl was taken back home by the police. He pleaded not guilty to the charge under section 19, but was convicted by the jury and sentenced to eighteen months' imprisonment. On June 30, 1958, the court gave leave to appeal solely for the purpose of enabling the appellant to argue a point of law which he took unsuccessfully before the trial judge, namely, whether the intended intercourse in this case could properly be described as " unlawful " as section 19 requires. The appellant's main contention is that that word connotes intercourse which is forbidden by law, and since the girl was over sixteen it was not so forbidden in this case, however immoral it was. Alternatively, he says that the section applies only if the girl is taken away for intercourse under circumstances such as would constitute the breach of a covenant in a lease not to create a nuisance, for example, to a house used as a brothel.

It is curious that the point has not apparently arisen before, because the 1956 Act is a consolidating measure, and there is a long history behind many of its provisions, though not so long behind section 19 itself. The researches of Mr. Kennedy have revealed that in the reign of Philip and Mary, for example, a statute was passed making it an offence to take an unmarried girl under the age of sixteen out of the possession and custody and against the will of the father (4 & 5 Philip and

Mary, c. 8) No particular intent, however, was specified as an ingredient of the offence. By the statute 18 Eliz. 1, c. 8, s. 4, it was enacted that if any person should unlawfully and carnally know any woman-child under the age of ten, it should be felony. It is difficult to suppose that " unlawfully " in this context meant contrary to some positive enactment. One would think that all intercourse with a child under ten would be unlawful; and on that footing the word would be mere surplusage. The same expression was used when this section was re-enacted in 1828 by 9 Geo. 4, c. 31, s. 17.

When one comes to the Offences against the Person Act, 1861, one finds section 49 making it an offence to have " illicit " carnal connexion with a woman or girl under twenty-one, if procured by false pretences or fraud; and section 50 re-enacting that it shall be an offence unlawfully to have carnal knowledge of a girl under ten. The precursor of section 19 of the 1956 Act is, however, section 7 of the Criminal Law Amendment Act, 1885, which provided that a person commits an offence who takes an unmarried girl under eighteen out of the possession and against the will of her parents with the intent that she shall be " unlawfully and carnally known " by any particular man or generally. This is now in substance re-enacted in section 19 of the 1956 Act. No great assistance is to be derived for present purposes from the language used in these earlier statutes, except that it does suggest that the word " unlawfully " in relation to carnal knowledge has not been used with any degree of precision. It would be natural, however, for the framers of a statute in days when the Canon Law would be more in their minds than to-day, to refer to any intercourse outside the bond of matrimony as " unlawful "; and for their successors when drafting Consolidating Acts simply to repeat the word without a close consideration of its necessity or precise meaning.

We reject the argument that in section 19 of the 1956 Act the word " unlawful " connotes intercourse contrary to some positive enactment. The argument at once prompts the question why, if the intercourse in question is already positively forbidden, section 19 should do it again. The answer suggested on behalf of the appellant is that under section 19 the law can step in before unlawful intercourse actually occurs and so prevent the mischief. This is perhaps a little imaginative when one considers the circumstances of most abductions; but the answer seems to us to be this: the plain purpose of section 19 is to protect young unmarried girls. That protection would be largely, if not wholly, illusory if in every case it were incumbent on the prosecution to prove that she was taken from her parents for the purpose of intercourse of a kind positively forbidden by some enactment, and not for intercourse not so forbidden. We do not think that such can have been Parliament's intention.

As regards the alternative suggestion that " unlawful " intercourse in section 19 connotes intercourse in a brothel or something of that kind, it is sufficient to observe that to procure a girl to leave her home to become an inmate of or to frequent a brothel, or to become a common prostitute, is made a specific offence by section 22 of the Act, and section 19 is not therefore needed for this purpose.

If the two interpretations suggested for the appellant are rejected, as we think they must be, then the word " unlawful " in section 19 is either surplusage or means " illicit." We do not think it is surplusage, because otherwise a man who took such a girl out of her parents' possession against their will with the honest and *bona fide* intention of marrying her might have no defence, even if he carried out that intention. In our view the word simply means " illicit," *i.e.*, outside the bond of marriage. In other words, we take the same view as the learned trial judge. We think this interpretation accords with the common sense of the matter, and with what we think was the obvious intention of Parliament. It is also reinforced by the alternatives specifically mentioned in sections 17 and 18 of the 1956 Act, *i.e.*, " with the intent that she shall marry, or have unlawful sexual intercourse. . . ."

There was ample evidence in the present case upon which

1958
July 20, 28

FRANK CHAPMAN

Devlin J., Donovan J., Ashworth J.

the jury could find that this girl was taken away by the appellant with the intent that he should have intercourse with her which was unlawful in the sense we have determined. As leave to appeal was given, however, to argue the point of law involved, the sentence will run from the date of conviction.

Appeal dismissed.

Solicitor: A. Norman Schofield, Town Clerk, Southampton, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DONOVAN AND MR. JUSTICE ASHWORTH

1958
July 28

STEPHEN McCARTAN

Sentence—Offences by Citizens of Irish Republic or Northern Ireland—Desire to send Offender back to Ireland—Probation Order Not Applicable—Common Law Recognisance Proper Course—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 3.

If a court desires in the case of a citizen of the Irish Republic or of Northern Ireland, instead of passing a sentence of Borstal training or imprisonment, to send the offender back to Ireland and to secure that he stays there, this cannot be done by means of a probation order, because the offender could not be placed under the supervision of a probation officer nor would there be a petty sessional division in this country which could deal with him if he broke the probation order; but the object can properly be achieved by binding the offender over at common law and making it a condition of the recognisance that he returns to Ireland immediately and does not return to this country for a specified period.

Reference by the Secretary of State under section 18 (*b*) of the Criminal Appeal Act, 1907.

1958
July 28

STEPHEN MCCARTAN

Goddard L.C.J., Donovan J., Ashworth J.

The appellant, Stephen McCartan, was convicted at Somerset Assizes on May 21, 1957, of demanding money with menaces, possession of an offensive weapon and common assault and was placed on probation for two years, and a condition was incorporated in the probation order that he should return to Northern Ireland and stay there. He returned to this country within the probation period and was convicted at Sherborne magistrates' court on November 15, 1957, of being drunk and disorderly. He was then brought back to Somerset Assizes to be sentenced for the original offence and was on January 25, 1958, sentenced by Stable J., to twelve months' imprisonment.

No counsel appeared.

THE LORD CHIEF JUSTICE: In this matter the Secretary of State under section 18 (*b*) of the Criminal Appeal Act, 1907, has referred a question to this court for their opinion. As a rule when a reference under that paragraph is made the court considers the matter in private and writes to the Home Secretary giving him their opinion, but in this matter at the request of the Secretary of State we are making public the advice we are giving the Home Secretary because it is a matter of some importance for the guidance of courts in the future.

There have been a considerable number of cases in the last year or two in which young men who are citizens of the Republic of Eire or of Northern Ireland have come over to this country and committed offences for which, if they were citizens of this country, they would be sent to Borstal. Once or twice, in fact not infrequently, courts here, instead of sending these young Irishmen to Borstal, have taken a course with the object of sending them back to Ireland and seeing that they stay there.

The particular question that has arisen in the case of one Stephen McCartan, who has petitioned the Home Secretary, is that the judge before whom he was brought made a probation order and made it a term of the probation that he should return to Ireland and stay there. He went to Ireland and then came back and was taken up by the police because he was found

1958
July 28

STEPHEN
MCCARTAN

Goddard
L.C.J.,
Donovan J.,
Ashworth J.

drunk and incapable in the street. Having been dealt with for that, he was then brought before a court of assize for a breach of the probation order and received a sentence of twelve months. The Secretary of State raised the question whether it was regular or possible under the Criminal Justice Act, 1948, to make it a term of the probation order that a probationer should return to Ireland and stay there. In the opinion of the court such an order cannot be made because section 3 of the Act, which is the section which deals with probation orders, provides that a probation order can be made requiring the probationer, the subject of the order, " to be under the supervision of a probation officer for a period to be specified in the order of not less than one year nor more than three years." Subsection (2) provides: " A probation order shall name the petty sessional division in which the offender resides or will reside; and the offender shall (subject to the provisions of the First Schedule to this Act relating to probationers who change their residence) be required to be under the supervision of a probation officer appointed for or assigned to that division."

If the attention of the court had been drawn to the provisions of that section, I think it would have been clear at once that it is not in the power of the courts of this country to make it a term of the probation order that the probationer shall go to Ireland and remain there because he could not be under the supervision of a probation officer, nor is there a petty sessional division in this country which can deal with him if he breaks the probation order. There is no petty sessional division which can be named so that he could be required to be under the supervision of a probation officer appointed for or assigned to that division. If the court has before it one of these young men whom the court thinks should be made to go back to Ireland instead of remaining in this country and that this country should not be put to the expense of keeping him at Borstal, the way to do it is to bind him over and make it a condition of the recognisance that he returns to Ireland and does not return to this country for such period as the court

1958
July 28

STEPHEN McCARTAN

Goddard L.C.J., Donovan J., Ashworth J.

may think fit. That was the order which this court made in the case of FLAHERTY (*unreported*). On June 23, 1958, we had a case in which I said : " This boy was convicted at Bow Street under the Vagrancy Act as a person loitering with intent, and he was sent to Sessions for sentence with a view, I suppose, to his being sent to Borstal, and that was where the learned Deputy Chairman sent him." Then I said : " He is just over nineteen," and went through his past history. " He has some petty convictions against him, but it seems to the court that there is really no reason why British taxpayers should have to pay the considerable sum of money it costs to keep boys in Borstal training, and the best thing to do with him is to send him back to Eire." I then called upon the boy and said: " The court is going to bind you over in your own recognisance in the sum of £10 that you accompany an escort to the train, where you will be sent to Eire tonight or as soon as arrangements can be made, and you do not land again in this country for at least three years."

That is an order which, in the opinion of this court, can be made. It must be made in the form of a common law recognisance and not in the form of a probation order. We shall, therefore, inform the Secretary of State that, in our opinion, this probation order was one which the court had no power to make and the order will have to be quashed. I should say, I think, that in this case the man is a citizen of Northern Ireland, but it is just the same. The probation officers in this country have no duties or powers in Northern Ireland, though they have in Scotland; that is dealt with in the Act, but it is these Irish cases we are now considering and, as I say, we shall advise the Home Secretary that the probation order is bad and that will probably mean that the boy will be released. It is only fair to say that the offence was not serious; it was drunkenness, and it is also fair to say that he said that he came over here to get in touch with the probation officer, and there is reason to believe that is true. For that reason we shall advise the Home Secretary that the probation order cannot stand.

[JUDICIAL COMMITTEE OF THE PRIVY COUNCIL]

BEFORE

LORD TUCKER, LORD SOMERVELL OF HARROW
AND LORD DENNING

1958
July 22, 23,
24; *Oct.* 2

SURUJPAUL *v.* REGINAM

Accessory Before the Fact—Murder—Accused Charged Jointly with Four Other Persons—All Others Found Not Guilty both as Accessories and Principals—Accused Convicted as Accessory Before the Fact—Inconsistency of Verdict.

The appellant was jointly charged and tried together with four persons on a charge of murder. All the four other persons were found Not Guilty both as accessories before the fact and as principals, but the appellant was found Guilty as an accessory before the fact to murder.

Held, that as, on an examination of the evidence, there was no distinction with regard to the evidence relating to the commission of the substantive offence as between the appellant and the other accused persons which could justify the verdict, the conviction must be quashed.

HUGHES (1860) Bell 242 and ROWLEY (1948) 32 Cr.App.R. 14 referred to.

Appeal against conviction.

The appellant was convicted at the criminal assizes for the County of Berbice in British Guiana on July 29, 1957, of being accessory before the fact to the murder of Claude Allen, a police-constable, and was sentenced to death. On January 8, 1958, the Court of Criminal Appeal of British Guiana dismissed an appeal by the appellant against conviction and from that decision the appellant now appealed.

The appellant was jointly charged and tried together with four others with the murder. The case for the prosecution was that they had jointly planned to rob the overseer of the Rose Hall Estate of the wages of the workers, amounting to $4,400,

1958
July 22, 23,
24; *Oct.* 2

SURUJPAUL
v. REGINAM

Lord Tucker,
Lord
Somervell
of Harrow,
Lord
Denning

and that Police-constable Allen was shot while escorting the overseer in a Land-Rover.

The appellant was found Not Guilty as a principal, but Guilty as an accessory before the fact and was sentenced to death. His co-prisoners (other than one of them who had been discharged at the close of the prosecution's case) were found Not Guilty both as principals and as accessories before the fact, the trial judge having directed the jury to find with regard to each of the prisoners still in their charge whether he was Guilty or Not Guilty as a principal and Guilty or Not Guilty as an accessory before the fact. The main ground of appeal was that it was not in law open to the jury to convict the appellant as accessory before the fact to the murder when the principals had been acquitted.

W. Percy Grieve, for the appellant.
J. G. Le Quesne, for the Crown.

At the conclusion of the arguments Lord Tucker said that the Board would humbly advise Her Majesty that the appeal be allowed and that the verdict and sentence on the appellant be quashed, and that they would give the reasons for their decision at a later date.

Cur. adv. vult.

October 2. The judgment of the Board was delivered by LORD TUCKER: The appellant was convicted at the criminal assizes for the County of Berbice in British Guiana on July 29, 1957, of being an accessory before the fact to the murder of Claude Allen and was sentenced to death. His appeal to the Court of Criminal Appeal of British Guiana was dismissed on January 8, 1958. He appealed *in forma pauperis* by special leave to Her Majesty in Council and this appeal was heard by the Board on July 22, 23 and 24, 1958.

The appellant was charged with four other men in one count with the murder of Claude Allen on March 9, 1957. The other four men will be referred to as accused Nos. 2, 3, 4 and 5. At the end of the case for the prosecution accused No. 2 was on the direction of the trial judge acquitted by the jury. Owing to uncertainty as to which, if any, of the remaining accused was actually present and taking part in the murder and which, if any, might have been accessories before the fact the jury were quite properly asked with regard to each accused whether they found him Guilty or Not Guilty of being accessory before the fact to murder and whether they found him Guilty or Not Guilty as principal. They found the accused Guilty as an accessory before the fact to murder and Not Guilty as principal, accused Nos. 3, 4 and 5 they found Not Guilty as accessories and Not Guilty as principals.

The appellant contended that these verdicts were contradictory and inconsistent and accordingly his conviction should be quashed. The Court of Criminal Appeal rejected this contention on the ground that the jury must have come to the conclusion on the evidence legally admissible against the appellant that he was accessory before the fact to murder committed by the other accused, although they were not satisfied, on the evidence legally admissible against each of the other accused considered separately, that the Crown had discharged the burden of proving the guilt of any one of them.

Sections 24 and 25 of the Criminal Law (Offences) Ordinance, Chapter 10 of the Laws of British Guiana, are as follows:

> Section 24. "Everyone who becomes an accessory before the fact to any felony, whether it is a felony at common law or by virtue of any statute for the time being in force, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon."
>
> Section 25. "Everyone who counsels, procures, or commands any other person to commit any felony, whether it is a felony at common law or by virtue of any statute for the time being in force, shall be guilty of felony, and may be indicted and convicted either as an accessory before the fact to the principal felony together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether

> the principal felon has or has not been previously convicted, or is or is not amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished."

These sections are for all practical purposes identical with sections 1 and 2 of the English Accessories and Abettors Act, 1861, which in their turn had previously appeared respectively in the Acts of 1826 and 1848. It may be convenient at this stage to refer to a passage in Russell on *Crime* (11th ed.) at pages 134 and 135 which shortly and accurately states the nature of this crime. It is as follows: " A simple but important point is sometimes overlooked, namely, that when the law relating to principals and accessories as such is under consideration there is only one crime, although there may be more than one person criminally liable in respect of it; if there are more than one person, then the question arises as to the category in which each one is to be placed, that is whether he is accessory before the fact, a principal in the first or second degree or an accessory after the fact. There is one crime, and that it has been committed must be established before there can be any question of criminal guilt of participation in it. It is true that one who procures, advises, solicits or instigates in any way another person to commit a crime is himself guilty of the common law misdemeanour of incitement whether or not the offence solicited is carried out; but incitement is a different offence from the one which is solicited; if and when the latter offence is committed then, and not until then, the inciter becomes a party to it, and if it be a felony, he is classed as an accessory before the fact, the fact being the crime which the incited person, has, in the character of principal in the first degree, carried out."

In the present case it was essential to the conviction of any one of the accused as accessory before the fact for the Crown to prove that he had counselled, procured or commanded one or more of the other accused persons to murder Claude Allen and that such person or persons had in fact murdered the said Allen. By their verdict the jury have found that murder by any one of the accused has not been proved, but none the less the appellant was guilty of having counselled one or more of them to commit murder and that one or more of them, unspecified, in fact committed it. This certainly appears, at first sight at any rate, an inconsistent and contradictory verdict.

In the course of the argument their Lordships were referred to several authorities, some dealing with the law as to conspiracy, which was said to be analogous for present purposes, and to the history and origins of the law with regard to principals and accessories, but it is sufficient to refer to the only two cases which really throw much light on the present question.

The first is HUGHES (1860) Bell 242. This was a case reserved by the Recorder of Manchester for the opinion of the Court of Queen's Bench. The prisoner Hughes had been charged together with one Hall in the first two counts of the indictment with larceny and in the third count alone with receiving. Both prisoners pleaded Not Guilty and were put in charge of the jury, whereupon counsel for the prosecution intimated that he did not propose to offer any evidence against Hall and applied that he should be acquitted in order that he might be called as a witness for the prosecution against Hughes. The Recorder acceded to this request and Hall was acquitted. He was called as a witness and testified that he had stolen the goods in question and sold or given them to Hughes. The jury returned a general verdict of Guilty against Hughes. The question reserved for the court was " whether, as the facts showed that Hughes, if guilty at all of the larceny was guilty only as an accessory before the fact, and Hall, the principal, having been acquitted, I ought not to have told the jury that Hughes was entitled to his acquittal on the counts for larceny, and that they were to confine their attention to the count for receiving only." The judgment of the court was delivered by Erle C.J.

He said that 11 & 12 Vict. c. 46, s. 1, had made the crime of being an accessory a substantive felony, and that the old law which made the conviction of the principal felon a condition precedent to the conviction of the accessory had been done away with. He added that the accessory, "*whether tried before or at the same time as the principal may be found guilty,*" although the principal be acquitted.

In the report of this case in 1 L.T. 450 at 452, instead of the words italicised above the sentence reads: "Whether the principal be tried before or at some time after the accessory before the fact, still there may be guilt in the accessory." The variation is perhaps of little importance, since in the case with which the court was dealing the principal had been acquitted on the same indictment and by the same jury, albeit the acquittal of the principal was reached in the absence of any evidence of the commission of the felony, whereas there was ample evidence of such commission in the evidence adduced on the trial of Hughes.

The second, and more recent, case is ROWLEY (1948) 32 Cr.App.R. 147. In this case the appellant had been charged at Birmingham City Quarter Sessions in one count together with two other men with breaking and entering and stealing, and in a second count together with the other two with receiving. In a further count the appellant was charged alone as an accessory after the fact to the felonious receiving by the other two. At the trial the appellant's plea on this last count was taken first. He pleaded Guilty and was sentenced. The trial of the other two men proceeded and they were acquitted on all counts. On appeal to the Court of Criminal Appeal (Lord Goddard C.J., Humphreys and Singleton JJ.) counsel for the Crown conceded that the procedure adopted had been quite irregular. Humphreys J. in delivering the judgment of the court quashing the conviction said, at p. 149: "In the result there is an error on record which cannot be cured by amendment. Writs of error have been abolished since 1908 by the Criminal Appeal Act, but this court has the power which the Court of King's Bench used to exercise in dealing with error on the record. Where there is no means of amending the record so as to make it consonant with the proved facts of the case and where the record is inconsistent with itself, as it is here, the only course which this court can take is to quash the conviction." The judgment then proceeded to comment on the undesirability of the course which had been adopted at the trial of taking the plea of the accessory before the trial of the principal felons.

It is to be observed that the case of HUGHES (*supra*) was not cited to the court and it is true that counsel for the Crown did not seek to support the conviction. Nonetheless, whatever the true view may be with regard to the technicalities, the course which had been adopted by the Recorder of Manchester in the last-mentioned case would now be regarded with even greater disapproval than that of the Assistant Recorder of Birmingham in ROWLEY's case (*supra*).

Their Lordships do not consider it necessary in this case to decide whether writ of error would have lain by reason of error on the record which could not be cured by reference to the evidence. They are content to deal with the case on the basis upon which counsel for the Crown sought to uphold the conviction, namely, by looking at the evidence to see if the inconsistency on the record is real or only apparent.

The case for the Crown was that the accused men had engaged in a plot to rob the overseer of an estate of the wages of the estate workers, and that on March 9, 1957, Walter Cameron, the overseer, was in a Land-Rover driven by a man named Ashroof together with a police escort, Claude Allen, near a place called New Dam, when two of the accused wearing masks and armed with a stick and a double-barrelled shotgun held them up. Cameron threw the wages to the man with a stick, a shot from the rear of the vehicle was fired and Allen was wounded. Five masked men were seen running away, and Allen died later in the day.

The case for the prosecution rested largely upon the evidence of a man named Dhajoo, whom the jury were rightly told to treat as an accomplice. His evidence went to prove the existence of a plot by the accused to rob the pay-roll and to make use of masks and to hide guns in preparation for the robbery. If believed, there could be little doubt of the existence of the plot, and there was material in all the circumstances from which they might have drawn the inference that the plan was carried out by all or some of the accused and that in the course thereof the murder was committed. But the jury, whatever they may have thought with regard to the evidence of the plot, evidently did not consider it sufficient to warrant the conviction of any of the accused as a principal. But it is said on behalf of the Crown that as against the appellant they may have found something in his statement to the police which would amount, with Dhajoo's evidence, to sufficient evidence and admissible against him that the crime was committed by one or more of those who had been " counselled or procured " by the accused so to do. This necessitates a close examination of the statement, but it may here be observed that, although such statement may afford very strong corroboration of Dhajoo's evidence with regard to the part taken by the appellant in the plot and as to his counselling or inciting the others to commit robbery or murder, it is difficult to see how it can afford any evidence as to the actual commission of the crime at which by their verdict the jury have found he was not proved to have been present and assisting. A voluntary statement made by an accused person is admissible as a " confession." He can confess as to his own acts, knowledge or intentions, but he cannot " confess " as to the acts of other persons which he has not seen and of which he can only have knowledge by hearsay. A failure by the prosecution to prove an essential element in the offence cannot be cured by an " admission " of this nature.

The passage in the statement of the accused relied upon by the Crown is as follows:

> " When Chandee, No. 2 accused, came back Sunday morning 10-3-'57 about 5 o'clock, he and Jagolall (No. 5) begin to gaff, and Jagolall ask Chandee why he shoot the

1958
July 22, 23, 24; *Oct.* 2

SURUJPAUL *v.* REGINAM

Lord Tucker, Lord Somervell of Harrow, Lord Denning

> man, and Chandee say when I say stick it up the man put he hand pon the revolver foh draw am out, and then Chandee and Battle Boy (No. 4) shoot am."

A statement of this nature cannot in their Lordships' opinion be regarded as equivalent to evidence by witnesses of the acts spoken to in this conversation and as sufficient to warrant as against the appellant a finding that Chandee (No. 2), and/or Battle Boy (No. 4), both of whom the jury acquitted, in fact committed the murder.

Their Lordships find it difficult to believe that in any event the jury applied this process of reasoning in arriving at their verdict. They consider it much more likely that the jury failed to appreciate the distinction between incitement to murder or conspiracy and being an accessory before the fact and that the passage in the trial judge's summing-up dealing with the appellant's case at page 194, l. 26, may have contributed to this result. He there said: "If you feel sure that the evidence does not prove that he was there on the dam, but that he conspired with others to rob this pay-roll money and to commit this crime of robbery with violence with loaded guns, then you may convict him of the offence of being an accessory before the fact to murder." In so saying their Lordships do not desire to be unduly critical of the learned trial judge's summing-up taken as a whole. This was a most difficult and troublesome case to deal with and was not made easier for judge or jury by the numerous objections which were taken at various stages, none of which are now relied upon.

Whatever may have actuated the jury in coming to these inconsistent verdicts, their Lordships are satisfied on an examination of the evidence that there was no distinction with regard to the evidence relating to the commission of the substantive offence as between the appellant and the other accused which could justify the result arrived at.

Their Lordships have accordingly humbly advised Her Majesty that this appeal be allowed, the verdict against and sentence upon the appellant be quashed and a verdict of Not Guilty entered.

1958
July 22, 23, 24; *Oct.* 2

SURUJPAUL *v.* REGINAM

Lord Tucker, Lord Somervell of Harrow, Lord Denning

Conviction quashed.

Solicitors: Lawrence Jones & Co., for the appellant; Charles Russell & Co., for the Crown.

GENERAL INDEX

ABDUCTION, 257

ACCESSORY,
  conviction where principal acquitted, 266

ADMISSIBILITY,
  argument on, 23
  of statement, 19

AFFIRMATION, 44

AIDING AND ABETTING,
  driving of overloaded vehicle, 240

ALIBI,
  rebutting evidence, 15

ARMY FORM,
  fraudulent statement, 93

AUTOMATISM,
  defence of, 51

BANKRUPTCY,
  debt to Inland Revenue, 85

BILL OF LADING,
  admissibility of, 177

BORSTAL TRAINING,
  second and third sentences, 221

BREACH OF PROBATION,
  inquiry into, 77

BURDEN OF PROOF,
  automatism, 51
  self-defence, 1

CHEQUE,
  post-dated, 165

COMMITTAL,
  to " foreign " court, 27
  validity of, 192

COMPLAINT,
    evidence of, 153

CONSPIRACY,
    coupled with charges of specific offences, 62
    indictment for, 207

CONVICTIONS QUASHED, 62, 85, 141, 177

CREDIT SALE AGREEMENT,
    effect of illegality, 141

DANGEROUS DRIVING,
    defence of automatism, 51
    no *mens rea*, 51

DEBT,
    meaning of, 85, 141
    to Inland Revenue, 85

DENMAN'S ACT, 47

DEPOSITION,
    failure of magistrate to sign, 192

DIMINISHED RESPONSIBILITY,
    definition of, 69
    evidence all one way, 145
    issue of insanity raised, 75
    plea of Guilty to manslaughter, 145

DISQUALIFICATION,
    special reasons, 236

DRIVING CERTIFICATE,
    forgery of, 168

DRIVING EXAMINER'S JOURNAL,
    forgery of, 168

ESTATE AGENT,
    fraudulent conversion by, 233

EVIDENCE,
    argument on admissibility, 23
    previous contradictory statement, 47
    rebutting, 15

FALSE PRETENCES,
    post-dated cheque, 165

FORGERY,
    driving certificate, 168
    driving examiner's journal, 168

FRAUDULENT CONVERSION,
    by estate agent, 233

HIRE PURCHASE,
    offence against regulations, 183

INDICTABLE OFFENCE,
    summary trial of, 38

INDICTMENT,
    conspiracy, 62
    fraudulent conversion, 233
    incest, 153
    joinder of offences, 35
    manslaughter, 35
    place of offence, 153
    variance from committal charge, 207

INDUCEMENT,
    not relating to charge or accusation, 19

INSANITY,
    raised as defence of diminished responsibility, 75

INTENT TO DEFRAUD, 168

IRISHMEN,
    offences by, 262

JURY,
    praying of tales, 9
    question after retirement, 227

MANSLAUGHTER,
    joinder of other counts, 35
    plea of Guilty to, 145

MENS REA,
    absence of, 51

MENTAL DEFECTIVE,
    carnal knowledge of, 98
    illegal detention as, 98

NOTICE OF INTENDED PROSECUTION,
    service of, 198

OATH,
    impossibility of administering, 44

OBTAINING CREDIT BY FRAUD, 141

OUTSTANDING OFFENCES, 91

PERJURY,
    "lawfully sworn," 44

PLEA,
    condition of return to Ireland, 262
    on ground of diminished responsibility, 145

PROBATION,
    offence during, 77

PROVISO,
    application of, 47, 153

PSYCHIATRIST,
    report of, 23

REBUTTING EVIDENCE,
    defence of alibi, 15

REGISTERED POST,
    notice sent by, 198

SELF-DEFENCE,
    rejection of defence of, 1

SENTENCE,
    Borstal training, 221
    breach of probation, 77
    concurrent, 132
    illegal, 77
    Irishman, 262
    method of pronouncing, 132
    offences by soldier, 91
    quashed, 77
    substituted, 19

SERVICE,
    of notice of intended prosecution, 198

SPECIAL REASONS,
    for not disqualifying, 236

STATEMENT,
    admissibility of, 19

STATUTORY DECLARATION,
    form of, 218

SUMMARY TRIAL,
    beginning of, 38

SUMMING-UP,
    diminished responsibility, 69
    provocation, 1

TALES,
    praying of, 9

TRIAL,
    postponement of, 27

UNLAWFUL SEXUAL INTERCOURSE, 257

VENIRE DE NOVO, 9

VENUE, 27

VERDICT,
    inconsistency, 62, 266
    manslaughter, 145
    substituted, 145, 227

WITNESS,
    affirmation by, 44
    child of five, 153
    power of judge to call, 153
    previous contradictory statement by, 47

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